

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 12

TRIAL TRANSCRIPT

December 18, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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I N D E X

Closing Argument by Mr. Oppenheim:	Page 2938
Closing Argument by Mr. Elkin:	Page 2977
Rebuttal Argument by Mr. Oppenheim:	Page 3021

1 P R O C E E D I N G S

2 NOTE: The December 18, 2019, portion of the
3 case begins in the absence of the jury as follows:

4 JURY OUT

5 THE COURT: All right. Good morning. I see all
6 counsel are here. Good morning to each of you.

7 Ready for our jury?

8 MR. OPPENHEIM: Yes, sir.

9 THE COURT: Okay. Joe, let's get our jury, please.

10 NOTE: At this point, the jury returns to the
11 courtroom; whereupon, the case continues as follows:

12 JURY IN

13 THE COURT: All right. Please have a seat.

14 Good morning, ladies and gentlemen.

15 THE JURORS: Good morning.

16 THE COURT: All right. Can I have a nod of heads
17 that you-all didn't do any research, investigation, or talk to
18 anybody?

19 NOTE: Jurors nodding heads.

09:08:50 20 THE COURT: Thank you so much.

21 All right. We'll proceed with closing arguments.

22 Mr. Oppenheim, please, sir.

23 MR. OPPENHEIM: Thank you, Your Honor.

24 THE COURT SECURITY OFFICER: Counsel, is that okay?

25 MR. OPPENHEIM: Yes.

1 CLOSING ARGUMENT

2 BY MR. OPPENHEIM:

3 Good morning. When this case began, I said this is a
4 case about an Internet provider that was swarming in piracy,
5 that said one thing but did another, and that put its profits
6 above the law. So now we've spent the last two-and-a-half
7 weeks hearing evidence in this case, and what we have heard and
8 seen demonstrates those three points clearly and unequivocally.

9 Under the law, Cox cannot knowingly contribute to
09:09:51 10 copyright infringement, nor can Cox profit from infringement it
11 has the right and ability to stop. But that is precisely what
12 Cox did over and over and over again.

13 Throughout this trial, Cox has focused its attention
14 to issues that are wholly irrelevant to the case. Cox would
15 much prefer that the jury spend its time thinking about privacy
16 and CAS and providing Internet for critical infrastructure,
17 instead of focusing on the massive infringement that was on its
18 network, that it knew was there but chose not to do anything
19 about because it didn't want to hurt its huge profit line.

09:10:34 20 Before I go any further, let me take a moment to
21 thank and appreciate each of you for your commitment, focus,
22 and attention during these last few weeks. I also would like
23 to thank and appreciate the court- -- courtroom staff, the
24 courthouse staff who have worked tirelessly to move this case
25 forward; opposing counsel, some of whom I have known for very

1 many years; and my team, who demonstrate the maxim that a
2 successful team is a group of many hands but of one mind in
3 representing our clients, who we believe passionately in.

4 Let me also acknowledge my clients in the music
5 industry. There are many representatives of them in the
6 courtroom today. This case, as I have said before, is
7 critically important to them, and their presence throughout the
8 trial and here today is testament to their passion for music,
9 the rule of law, and the desire for justice.

09:11:35 10 Let me take a moment to give you a road map of the
11 points I will be covering during this closing. First, I'm
12 going to discuss what this case is about. Then I'm going to go
13 through the elements of the claims. We're going to talk about
14 Cox's failed policies. Then we're going to touch on what this
15 case is not about, and finally turn to the issues of
16 willfulness, damages, and the verdict.

17 So as I indicated before, the P2P on the Cox network
18 was overwhelming. You heard testimony from experts that there
19 were hundreds of millions of infringements on BitTorrent each
09:12:18 20 day and that over 99 percent of that infringement was -- of
21 that content was infringing.

22 Mr. Bahun from MarkMonitor testified about GDPI
23 checks; you may recall that; and based on those GDPI checks, he
24 testified that on Cox's network alone, there was more than
25 10,000 infringements per day of plaintiffs' works.

1 The number of infringements that were the subject of
2 notices was lengthy. You have seen this list during the trial
3 and will recall that it shows over 270,000 infringement notices
4 between 2012 and 2014, but we know from the testimony -- excuse
5 me, we know from the testimony that the list of infringements
6 on the entirety of what was being infringed is much greater
7 than that.

8 In 2010, the RIAA sent an e-mail to Cox with a
9 spreadsheet showing all of the infringements it was finding on
09:13:25 10 the Cox network but could not send to Cox because of the caps
11 that were imposed. Based on what the RIAA found, Mr. Marks
12 approximated that in 2009 to 2010, there were over 280,000
13 infringements that the RIAA was not permitted to send notices
14 on.

15 If you extrapolate that out for the claim period in
16 this case, it means that there were roughly 1.1 million
17 infringements on the Cox network of plaintiffs' works for which
18 there were no notices. And these numbers are just the
19 infringements of the plaintiffs' companies. If you add in all
09:14:06 20 of the infringements of all of the other copyright holders who
21 you have heard about during the course of this case, you can
22 see that Cox's network was swarming in piracy.

23 Cox said one thing but did another, and as I said
24 previously, this was a habit of Cox. Cox told subscribers
25 copyright infringement was prohibited but then allowed repeated

1 copyright infringement. Cox told copyright owners it would
2 stop the infringement but implemented rules that did anything
3 but stop the infringement. Cox said it wanted to educate
4 customers but rarely forwarded infringement notices to those
5 customers. This defies common sense.

6 Cox said it had a policy that led to termination but
7 created an unwritten policy that undid terminations, and then
8 they stopped terminating altogether. Cox said it took
9 copyright infringement seriously, but Cox's abuse team treated
09:15:19 10 the issue with anything but respect.

11 And Cox now says, as you heard during Cox's opening
12 statement, that Internet service was too precious to terminate
13 lightly. It was an essential service. But then Cox terminated
14 over 600,000 customers when they didn't pay.

15 Keep all of this in mind and think critically when
16 you hear more talk and argument from Cox in its closing. Pay
17 attention to what Cox did, not what Cox now says it did.

18 Cox put its profits above the law. In e-mail after
19 e-mail, we saw what motivated Cox. It was profits. Cox
09:16:08 20 prioritized customer payments over all else in deciding whether
21 to terminate.

22 You have seen both of these e-mails during the course
23 of this trial: Mr. Sikes indicating that this customer pays
24 over \$400 a month and will likely cancel services if
25 terminated, every terminated customer becomes lost revenue; or

1 Mr. Zabek's e-mail to his abuse group, advising them to try to
2 keep customers and gain more RGUs, revenue-generating units.

3 Remember Mr. Bakewell? He testified that if Cox had
4 terminated customers, it would have lost monthly billings.

5 That is putting profits ahead of the law.

6 As Cox was getting crushed by DMCA notices -- and
7 that's their term. Remember in the e-mail, they said they were
8 getting crushed by notices. It slashed its TOC, the call
9 center responsible for dealing with infringement calls. It
09:17:13 10 slashed the staffing there from nine to four, and the abuse
11 team was slashed from five to two.

12 When you think about the size of Cox and its over
13 20,000 employees, it is beyond baffling that it would not staff
14 up a real team of real employees to address these infringement
15 issues. It is even more baffling that it cut the staff as the
16 problem was growing.

17 Cox wasn't concerned with complying with the law. It
18 was concerned about keeping its costs down and its profits up.

19 Cox refuses to accept responsibility. Listening to
09:17:55 20 Cox at this trial, everyone else is to blame but Cox.

21 MarkMonitor doesn't work properly. Peer-to-peer users lie
22 about bitfield and fake content. Plaintiffs should have sued
23 tens of thousands of Cox's subscribers anonymously, as though
24 Cox didn't do anything wrong. Plaintiffs should have sued
25 other ISPs. The RIAA should have sent more notices, but other

1 copyright owners sent too many. Net neutrality prevented Cox
2 from acting responsibly. CAS didn't do enough, but it cost too
3 much for Cox to participate. Rightscorp shouldn't have made
4 settlement offers in its infringement notices.

5 Instead of accepting responsibilities for its
6 failings, Cox blames the victims.

7 Let's turn to the issue, the elements of the claims.
8 One of the Cox's main arguments in opening was to say that
9 there was no evidence of direct infringement. This is absurd.
09:19:13 10 Just saying something without backing it up means nothing. The
11 evidence of infringement was overwhelming, and more
12 importantly, it was documented.

13 For all of Cox's efforts to deny that the
14 infringement occurred, it cannot point to any documentation to
15 support its argument. Importantly, while Cox now argues that
16 the infringement was not happening, Cox never told the RIAA at
17 the time that the infringement notices were inadequate or
18 inaccurate.

19 In fact, Mr. Zabek even testified that when Cox
09:19:51 20 received an RIAA notice, it assumed they were valid, and
21 Mr. Carothers similarly testified that he took the RIAA
22 allegations to be fair and proper infringement notices.

23 So as we consider the evidence of direct
24 infringement, remember it includes both downloading, which is
25 copying or reproduction, and uploading, which is distribution

1 or sharing. In this case, we have evidence of both.

2 So what is that evidence? Recall Mr. Bahun, who
3 worked for MarkMonitor. This is the gentleman who the FBI, the
4 Department of Justice, and Homeland Security brings in to train
5 their agents on peer-to-peer issues.

6 And as a company, MarkMonitor is used by some of the
7 largest and most well-known companies in the world: movie
8 studios, book publishers, Google, Apple, Nissan, Coca-Cola,
9 banks, professional sports leagues. MarkMonitor is the gold
09:20:56 10 standard when it comes to antipiracy, and its process is
11 precise and meticulous.

12 MarkMonitor goes on to a peer-to-peer network. It
13 downloads and confirms a file is infringing. It then collects
14 evidence on users distributing that infringing file by
15 connecting to a peer and beginning the download process. By
16 downloading all of the information, that indicates that the
17 peer is actively distributing the infringing file and how.

18 Once all of that is confirmed and documented,
19 MarkMonitor sends an infringement notice to the relevant ISP,
09:21:36 20 and in this case, that was Cox.

21 Mr. Bahun went through numerous data packages of
22 evidence, and ultimately, as you saw, all of that data came
23 together to demonstrate why MarkMonitor's evidence collection
24 process worked.

25 And you will recall that Ms. Frederiksen-Cross

1 testified as a technology expert. Now, she has spent a
2 lifetime looking under the hood at real systems in the real
3 world, and she testified that she reviewed the MarkMonitor
4 process, the MarkMonitor and Audible Magic source code, and the
5 evidence collected in the case, among other things, and her
6 conclusions were clear.

7 She determined that the MarkMonitor system accurately
8 detected peers that are copying and distributing the
9 plaintiffs' copyrighted works, and that it prepares and sends
09:22:27 10 accurate notices about that infringement activity that it
11 detects.

12 During the course of Mr. Bahun's and
13 Ms. Frederiksen-Cross's testimony, they were asked about a
14 couple of different data fields that looked like it had certain
15 hashes that had two different recordings associated with them.
16 Do not be misled. These are litigation games. Cox is
17 desperate to find a glitch, but it can't.

18 You may recall that one of them was a file mislabeled
19 by a user as a Taylor Swift track, when Audible Magic had
09:23:02 20 reported that, in fact, it was a Lady Gaga song. We then
21 played the song in court, and lo and behold, it was Lady Gaga,
22 "Poker Face." That was one of the three examples.

23 That is no different than somebody putting the Lady
24 Gaga CD in the Taylor Swift CD case. This is not an error.
25 Notably, not a single Cox witness, fact or expert, testified at

1 all about these data fields. Not a single Cox witness
2 indicated that there was an issue.

3 And you will recall that many of the songs that were
4 raised were not even in the case. Efforts like this by Cox and
5 its counsel implying that there is a problem with the evidence
6 by pointing to a line or two of data out of millions of data
7 entries are nothing more than smoke and mirrors. Use your
8 common sense. Don't be misled by these efforts to distract you
9 by the mountains of evidence before you.

09:24:05 10 Defendants have also claimed that because plaintiffs
11 did not re-download the infringing works from each and every
12 customer, there is no evidence of direct infringement. This is
13 one of those after-the-fact arguments that defies common sense.

14 Cox is now claiming that despite all of its own
15 internal documents about the infringement on its network, all
16 of the notices from all of the copyright owners, and all of the
17 evidence that's been presented, that the infringement wasn't
18 actually happening. Frankly, it's like claiming that there's
19 no moon and stars in the sky, when everyone can look up and see
09:24:44 20 it plainly.

21 Both Mr. Bahun and Ms. Frederiksen-Cross testified
22 that a second download was totally unnecessary. Mr. Bahun
23 testified in response to a question about it by Cox's counsel:
24 Well, we've already downloaded the file in its entirety when we
25 initially found it. So we know what the file is, and we have

1 the unique file identifier that guarantees what that file is,
2 and it's unique to that specific file. And so when we
3 communicate with the peer, they tell us what they have, which
4 confirms the file, and they tell us what they're distributing.
5 So there's no need to go further than what -- excuse me, no
6 need to go further than that when they've confirmed it.

7 Cox's argument on direct infringement comes in two
8 pieces. First, Cox suggests that all of its subscribers
9 brought legal copies into the peer-to-peer swarms; in other
09:25:47 10 words, the subscribers did not download the infringing
11 recordings illegally from the swarm.

12 So let me give you an analogy here to help understand
13 the absurdity of this argument. Imagine a college class with
14 hundreds or thousands of students. They are all asked to write
15 an essay, and they all come into class with their essays, and
16 those essays are exactly the same, not just word for word the
17 same, but every space and line break is exactly the same. Cox
18 would have you believe that each one of those students
19 independently wrote those essays and that they weren't copying
09:26:27 20 from each other.

21 Remember that because these files on the swarms all
22 had the same hash, they were precisely the same, down to the
23 last bit and byte. If everyone on a swarm had the exact same
24 file, they copied it from one another. That is reproduction.

25 Cox's second argument is that there's no evidence

1 that the Cox subscriber was actively distributing the file
2 because peers may be lying about their files and you cannot
3 rely on hash identification. This is the same hash
4 identification that is used by financial institutions to
5 conduct business.

6 So this is Dr. Feamster's story. It's an absurd
7 theory. It requires a willing suspension of disbelief to
8 believe it.

9 So let me turn to Dr. Feamster. He is a
09:27:24 10 well-credentialed man, no doubt, but to put it mildly, he's not
11 credible and was hardly disinterested. Dr. Feamster authored a
12 paper that sought to improve BitTorrent. He wanted to improve
13 BitTorrent for popular files.

14 Now, he said the popular files were Linux and not
15 Lady Gaga, but you can use your own common sense to realize
16 what he was really saying.

17 And in that paper, he indicated that he wanted to
18 give BitTorrent users plausible deniability. That's not
19 something people do legitimately.

09:28:03 20 And Dr. Feamster at his deposition wouldn't even
21 agree that copyright infringement is unlawful. And then you
22 saw video clip after video clip of Dr. Feamster's conflicting
23 testimony during the trial. He'd say one thing in his
24 deposition and another thing when he was on the witness stand
25 before you.

1 Remember one of Dr. Feamster's slides where he said
2 that there was no reliable evidence of infringement? Let's
3 think about this slide. Professor Feamster admitted that he
4 could not find a single inaccurate notice to Cox. The sole
5 basis for his conclusion that there was no reliable evidence
6 was his theories about lying bitfields and corrupted files, and
7 he claimed that that amounted to 1 percent of the time, but he
8 couldn't even -- he couldn't cite to a single analysis or study
9 that supported that 1 percent conclusion.

09:29:06 10 If everyone on a BitTorrent swarm were lying and all
11 the files were corrupted, BitTorrent wouldn't work. BitTorrent
12 wouldn't have tens of millions of users. Dr. Feamster's
13 testimony is all about theoretical possibilities, with no
14 evidence that it actually occurred, not once.

15 What makes Cox's argument on direct infringement all
16 the more bewildering is all of Cox's own statements. Don't
17 just take plaintiffs' word for it that there's infringement on
18 the -- Cox's network. Remember what Cox's own employees said.
19 Recall Mr. Zabek in an e-mail said: 99 percent of the DMCA
09:29:48 20 violations is from people using P2P on purpose, not Trojan
21 activity.

22 And Mr. Vredenburg in his e-mail to Mr. Zabek:
23 Here's another example of a customer who is a habitual abuser.

24 We could go on and on with these e-mails. We saw
25 many of them. Those are just two.

1 Think about what Mr. Cadenhead said. Now,
2 Mr. Cadenhead no longer works for Cox, but he worked there for
3 a great many years and was the legal counsel responsible for
4 overseeing the abuse program. And what he said was: Cox
5 recognized that there was a real problem with copyright
6 infringement and that the recording industry had proper
7 concerns about it. He testified that Cox almost certainly knew
8 that some of its customers were infringing and needed to stop.

9 So you've heard and seen a lot of evidence on direct
09:30:48 10 infringement, and at the end of the day, you will need to use
11 your common sense. MarkMonitor sent over 270,000 infringement
12 notices. There really can be no doubt that those subscribers
13 were downloading and uploading plaintiffs' music on Cox's
14 network.

15 So now we've covered the issue of direct
16 infringement. Let's turn to the other elements. Two of the
17 other elements have been taken care of for you. The judge has
18 instructed -- instructed you last night that the plaintiffs
19 have already established that they own 10,017 works at issue in
09:31:28 20 this case and that the copyright and its registration in each
21 of those works is valid.

22 The judge has also instructed you that plaintiffs
23 have also established the knowledge element of the contributory
24 infringement claim; that is, plaintiffs have established that
25 Cox had specific enough knowledge of infringement occurring on

1 its network that Cox could have done something about it.

2 Let me turn to the elements of material contribution
3 and right and ability to supervise. There really can be no
4 doubt about either of these. They're not a high bar.

5 Cox built its network and provided routing services
6 and switches to direct data and content flow. Cox sold access
7 to that high-speed internet service to infringing subscribers.
8 And Cox then continued to provide unfettered service to those
9 that Cox knew were repeatedly infringing. Cox knew its
09:32:33 10 subscribers were infringing and yet knowingly let them continue
11 using the service.

12 Beyond creating and providing the service itself, Cox
13 provided anonymity to its subscribers. A copyright owner has
14 no ability to look at a network and tell who a particular
15 subscriber is, who may be infringing using a particular IP
16 address. Cox is the only one who knows that an IP address is
17 assigned to a particular subscriber at a particular date and
18 time.

19 And Cox testified, you heard Ms. Trickey testify that
09:33:13 20 Cox will not disclose the identity of its subscribers absent a
21 subpoena. That means a lawsuit.

22 All of that easily meets the low threshold of
23 material contribution.

24 Cox's AUP, the Acceptable Use Policy, both
25 residential and business, expressly grants Cox the right to

1 terminate or suspend a subscriber's account for infringement,
2 and we know, because we've seen it, that Cox has the ability to
3 terminate subscribers. It terminated 13 for purposes of
4 plaintiffs' notices for copyright infringement and 600,000 for
5 nonpayment. We clearly know they have an ability to terminate.
6 That is the right and ability to supervise the infringing
7 activity.

8 While the judge does not explain in the instructions
9 what "supervise" means, you can see that because Cox can
09:34:12 10 suspend or stop the infringement, that is the essence of
11 supervision.

12 The second element of the vicarious infringement
13 claim is direct financial benefit. Here the evidence was
14 clear. Mr. Zabek admitted that financial considerations were a
15 factor in making decisions about whether to terminate an
16 infringing subscriber. And, of course, we saw e-mail after
17 e-mail where Cox decided that it was not going to stop a
18 subscriber from infringing because Cox wanted to collect
19 monthly fees.

09:34:47 20 This is the textbook definition of direct financial
21 benefit. Cox kept the infringing customer on its network so
22 that it could keep the money coming.

23 Apart from all of the internal e-mails, Dr. Lehr also
24 did an analysis of the value to Cox of the infringing
25 subscribers based on the number of tickets that that subscriber

1 had been the subject of. By not terminating the accounts of
2 infringing subscribers, Cox was able to collect hundreds of
3 millions of dollars from them.

4 Mr. Bakewell criticized Dr. Lehr's analysis as flawed
5 because he included revenues from other services, such as
6 television and telephone, but Mr. Bakewell ignored that Cox's
7 entire business strategy revolves around bundling and the
8 demonstrated fact that when Cox terminates subscribers for
9 infringement, the customer tends to discontinue all services.

09:35:52 10 Cox's Acceptable Use Policy demands enforcement. By
11 not enforcing it, Cox was making money. That's direct
12 financial benefit.

13 But we can look at specific examples as well. This
14 is an example you saw before during the trial of a fraternity
15 that had a business account through Cox, and after the 13th
16 notice, when even under Cox's policy, it should have been
17 subject to termination, it continued to receive service, and
18 Cox collected \$12,500 over the course of the next
19 two-and-a-half years because -- from that customer by not
09:36:35 20 terminating.

21 Or let's consider a residential customer. This one,
22 same situation, more than 13 infringement notices. This
23 residential customer Cox collected \$8,500 from by virtue of not
24 terminating.

25 Now, we're not going to go through 57,000 examples

1 like this, but this is what you'll see when you look at these
2 examples.

3 Now, Cox will undoubtedly claim that no matter what
4 examples I put up before you, that they're outliers, but,
5 ladies and gentlemen, not all of the evidence that Cox doesn't
6 like can be an outlier.

7 We've previously talked about how the burden of proof
8 is preponderance of evidence. Before we leave our discussion
9 of the elements of claims, I want to make sure that we come
09:37:32 10 back to this, the burden issue.

11 Remember, this is not a case where plaintiffs need to
12 demonstrate proof beyond a reasonable doubt. You've heard
13 evidence from both sides. The question for you to decide is
14 what is more likely. Do you think it is more likely that the
15 infringement plaintiffs claimed happened on Cox's network
16 actually happened, or is it more likely that the plaintiffs
17 just made it up?

18 Remember the burdens here. The plaintiffs need only
19 have 50.1 percent compared to the defendants' 49.9 percent. A
09:38:09 20 feather more of evidence is enough under the preponderance of
21 evidence standard. Of course, here it's not even close. The
22 plaintiffs' evidence is overwhelmingly more compelling,
23 documented, and accurate than anything that Cox has put
24 forward.

25 Let's turn to Cox's failed policies. As we've

1 discussed, Cox's policies were a sham. Cox's Acceptable Use
2 Policy strictly forbids infringement, all infringement. You
3 heard Ms. Trickey testify that the Acceptable Use Policy didn't
4 allow even just a little bit of infringement.

5 Importantly, the Acceptable Use Policy also obligated
6 subscribers to be responsible for what happened on their
7 account on both the residential and the business side. And we
8 saw when we looked at the Acceptable Use Policy with
9 Ms. Trickey on the business side that even business customers
09:39:15 10 had an obligation to be responsible for the end users and
11 impose on the end users the Acceptable Use Policy that Cox had.

12 And we even saw that Cox required that, that any
13 commercial ISP that was reselling service have a one-step
14 graduated response policy, that they needed to suspend end
15 users right away upon learning about any infringement notice.

16 So that was the AUP. Well, during the trial,
17 Mr. Negretti, Cox's marketing executive, testified that giving
18 AUPs to customers but not enforcing it amounts to fraud, but
19 that is precisely what Cox did. It had a policy that it did
09:40:07 20 not enforce in any way whatsoever. Mr. Negretti said it and I
21 agree: It's fraud. Cox's AUP was a hollow statement made by
22 Cox to give the appearance that it was going to obey the law.

23 As you know, the team responsible for implementing
24 the AUP was the abuse team. It was a team that created the
25 graduated response policy and watered it down year after year

1 after year. Remember, it began with three strikes, but over
2 time, as the number of notices mounted, Cox amended its policy
3 to 10 steps, then to 12 steps, then to 14 steps.

4 As the problem got worse and worse, Cox didn't
5 tighten up its ship to address the problem; it did just the
6 opposite. Cox changed the rules. Those rules helped Cox. It
7 helped Cox avoid friction, friction with its customers.

8 You'll remember that Mr. Negretti used that term,
9 "friction," that Cox wanted to avoid friction with its
09:41:21 10 customers. By changing the rules, Cox didn't have to warn,
11 suspend, or terminate its customers, but changing those rules
12 hurt the copyright owners. Despite knowing that its
13 subscribers were infringing, Cox didn't want to stop the
14 infringement because it would have led to friction. For Cox,
15 it was a decision to put its own financial interests ahead of
16 that of the copyright owners.

17 I want to pause for a moment on the idea that Cox had
18 a 14-step policy. Let's even assume they actually implemented
19 that policy. We've discussed 14 steps so much during the
09:42:01 20 course of this trial, when we say it now, it almost sounds like
21 an acceptable reality, but it really isn't.

22 We're not here to -- giving infringers 14 instances
23 of being caught before Cox would stop the infringement, it
24 makes no sense. Think about whether there's anywhere else in
25 the law where you're given 14 opportunities to obey the law

1 before anything's done. That doesn't exist, and there's a
2 reason it doesn't exist. It makes a mockery of the law.

3 Now, we're not here to say what Cox's policy should
4 have been, but I can guarantee you it shouldn't have been this.

5 But the 14 steps wasn't the half of it, because
6 remember, Cox gamed its own policy. And in opening, I
7 described for you five ways that it gamed its policy, but then
8 I actually listed six. So I'm going to list six now.

9 The first one was they had a mandatory termination
09:43:04 10 provision when it began, and they got rid of that and they went
11 to discretionary termination, a pretend termination policy with
12 an excuse not to terminate.

13 And you heard Dr. McGarty yesterday talk about having
14 ambiguity in policies, and how for an ISP, that doesn't work.

15 The second way Cox gamed its own policy is that it
16 ignored the first notice it received with respect to any
17 infringing subscriber. Now, contrary to repeated claims that
18 it wanted to educate, Cox more often than not wouldn't even
19 forward the notices it was receiving.

09:43:48 20 Cox's own interpretation of the Digital Millennium
21 Copyright Act obligated it to forward the notices. Its own
22 policy said they had to forward the notices.

23 This wild ignore-the-first-notice concept was the
24 brainchild of Mr. Carothers, who you heard testify, and he
25 indicated that he had conducted a study to justify this policy,

1 but you saw no study.

2 Think about all the evidence you saw, and then think
3 about the critical study that he referred to that he
4 conveniently never produced for purposes of this litigation.
5 It's a farce, and you should not be fooled by it, nor the
6 nonsensical notion that not sending a notice to someone is as
7 effective as sending a notice, which is what he was saying.
8 The idea that by not sending a notice, Cox was going to
9 effectively stop the infringement is absurd.

09:44:50 10 The third way Cox gamed its system was with daily
11 suspension limits. This was another gimmick. As Cox's daily
12 limit of 300 suspensions per day would routinely be hit by
13 9 a.m., Cox gave infringing subscribers a free pass in its
14 graduated response policy. But let's look at how that actually
15 played out with two examples.

16 So the top is -- these are both residential
17 subscribers. The top one was the subject of five tickets. I
18 wanted to pick something that Cox could clearly claim was not
19 an outlier. It was five tickets.

09:45:29 20 Three of those tickets were listed as hard limits,
21 and you'll recall that hard limits means that they were
22 received by a copyright owner who had exceeded the threshold;
23 and here, because of that, you'll see that this Cox subscriber,
24 even though they had been caught and reported five times, was
25 never warned by Cox a single time.

1 On the bottom, you see a subscriber who is the
2 subject of ten infringement notices, at least ten, because
3 remember, tickets sometimes are less than notices because they
4 bundle them up together, assuming they even accept them. Here
5 ten tickets, seven hard limits, no warnings.

6 So this was a customer who was caught and reported
7 ten times for copyright infringement, and what did Cox do to
8 educate that customer? Zero. Nothing.

9 What possible justification can Cox come up for this
09:46:23 10 policy other than helping itself? The answer is none. This
11 unwritten policy had a double positive effect for Cox. It
12 suspended fewer customers, which led to less friction, and it
13 reduced the inbound call volume, which reduced Cox's costs.
14 Unfortunately for the plaintiffs, this policy compounded the
15 infringement problem.

16 Let's turn to the issue of caps. Cox set hard limits
17 on the number of notices that it was willing to receive from
18 different copyright owners. The effect of this was staggering.
19 It had the effect of ignoring tens of thousands of notices,
09:47:07 20 with no customer-facing action.

21 And you can see from Mr. Sikes' e-mail how seriously
22 they took this: We need to cap these suckers.

23 Yeah, that's respectful.

24 The impact was twofold. Some copyright owners abided
25 by the limits by only sending the limit or less. Others sent

1 more, but Cox would simply log the notice and do nothing with
2 it.

3 The notion that an ISP can put its hands over its
4 ears so it does not hear about the infringement on its network
5 has no place in the law. Cox does not get to tell the
6 copyright owners that they are limited to the amount of theft
7 that they report. What Cox did with caps is not legal, it's
8 not ethical, and not how a company that cares about copyright
9 acts.

09:48:03 10 Let's turn to the issue of blacklisting. You heard
11 Cox admit that it blacklisted rights holders in two ways: It
12 took notices in and it silently deleted them, or it simply
13 rejected notices at the mail server.

14 Now, Cox wants you to believe that these notices were
15 threatening and bordered on blackmail, but a copyright owner
16 has a right to offer to resolve an infringement dispute with an
17 infringer. That's not blackmail.

18 Cox deleted millions of notices from blacklisted
19 parties, millions of notices ignored, millions of infringement
09:48:42 20 ignored with a free pass to the subscriber. These notices, had
21 Cox looked at them, would have helped Cox to identify and
22 address the infringement on its network.

23 Let's turn to the last issue of reactivation. Now,
24 you've seen this e-mail several times already, but I want to go
25 through it one more time because it brings together so many of

1 Cox's misdeeds in one place. So this was an e-mail that Jason
2 Zabek said to -- sent to his abuse team, and you'll recall that
3 it was labeled as proprietary info not to be shared outside of
4 Cox or abuse reps.

5 Well, as soon as you see something like that, you
6 gotta wonder what they're going to say. Well, and he tells the
7 motive for the e-mail right up front: Cox wants to hold on to
8 every subscriber that it can.

9 And then he describes the actual policy, the
09:49:43 10 unwritten policy that undoes the actual policy: If a customer
11 is terminated for DMCA, you're able to activate them after you
12 give them a stern warning.

13 And then he explains: Well, we still have to
14 actually terminate them in order to get -- be in compliance
15 with the safe harbor, but once the termination is complete,
16 we've fulfilled our obligation, and then we can just restart
17 the counter again.

18 And he reminds everybody: This is an unwritten
19 semi-policy.

09:50:11 20 And then we get the best line of all: Remember to do
21 what is right for our company and subscribers, not to do what
22 he's obligated to do under the law.

23 Mr. Vredenburg then commented on this new policy in
24 an e-mail, where he said: This gives the customer ten chances
25 to share files before they even have to talk to us again.

1 Let's, let's look at what the impact of Cox's
2 suspensions and reactivations was. So here are two examples.
3 Again, hopefully Cox won't claim these are outliers.

4 The first one had 18 tickets and had four
5 suspensions. Obviously, given Cox's policies, this has to be a
6 situation where there were significant number of copyright
7 infringement notices before the 2012 date, when infringement
8 notices began in this case.

9 So there are four suspensions. All of them ended in
09:51:18 10 reactivations. The average reactivation time? Seven minutes.
11 The one below, we got three reactivations. The average time to
12 reactivate? Twelve minutes.

13 If suspensions and reactivations were happening this
14 quickly, it begs the question of how much education was
15 actually occurring and whether Cox's suspensions had any impact
16 on Cox's infringing customers at all.

17 And Mr. Vredenburg testified as to what he viewed his
18 role within the TOC, and he said that termination was the
19 farthest thing from his mind.

09:51:57 20 All of this demonstrates that Cox was not trying to
21 stop the infringement. Despite the AUPs and the graduated
22 response policy, Cox did everything it could to avoid
23 terminating.

24 Let's talk about how 14 steps wasn't really 14 steps.
25 Now, Mr. Carothers, you heard him testify that he believed that

1 Cox's graduated response policy was very effective. Of course,
2 no witness produced any e-mails, studies, or analyses from 2010
3 to 2014 that showed anything of the sort.

4 If a multi-billion-dollar company builds a system
5 that was actually intent on stopping infringement, wouldn't you
6 expect to see some testing or analysis of its program?
7 Wouldn't you expect to see some contemporaneous evaluation of
8 what they were doing?

9 Cox claims its system was effective, but since you
09:53:01 10 saw no data or analysis to support this claim, you should
11 question that statement. The reason those analyses don't exist
12 is because Cox didn't want to do them, because Cox knew what
13 those analyses would show. It would confirm precisely what we
14 have seen during this trial. Cox's system was horribly flawed.

15 You may recall the testimony of Dr. Weber. She did
16 an after-the-fact statistical analysis of what happened on the
17 Cox network. The problem with her analysis was that it was
18 blatantly skewed. Dr. Weber ignored the data to supposedly
19 eliminate bias, but in so doing, she eliminated 15,000
09:53:50 20 customers. That is bias.

21 She dropped the 15,000 subscribers who had the
22 longest history of infringement in order to do her analysis.
23 And not surprisingly, when she did that, she got better numbers
24 than Professor McCabe did.

25 But even with her flawed analysis and exclusion of

1 the worst data, her conclusions still confirm that Cox had a
2 massive infringement problem that it was not stopping.
3 Dr. Weber concluded that there were over eighteen-and-a-half
4 thousand subscribers based on the RIAA notices that were the
5 subject of three or more tickets. There were over 10,000
6 subscribers who were the subject of five or more tickets.

7 Weber's own analysis shows that after each step of
8 Cox's graduated response, a substantial percentage of
9 subscribers continued to infringe. Dr. Weber in her testimony
09:54:51 10 sought to focus on those subscribers who were the -- who were
11 not the subject of further notices. But this case is not about
12 those subscribers who may have stopped infringing. This case
13 is about the subscribers who continued infringing and Cox
14 didn't stop.

15 Moreover, even when Dr. Weber saw that a particular
16 subscriber was not the subject of any more notices, that
17 doesn't mean that the subscriber stopped infringing. Let me
18 try using an analogy. Think about speeding tickets. Just
19 because somebody doesn't get a speeding ticket doesn't mean
09:55:28 20 they aren't speeding. There are only so many policemen out
21 there. There are only so many tickets they're giving. There
22 are many, many people who speed who don't get tickets, but
23 Dr. Weber would have you believe that just because there was no
24 ticket, there was no infringement.

25 Unlike Dr. Weber, Professor McCabe looked at the

1 entire dataset of fifty-seven-and-a-half thousand subscribers,
2 and what he found was that over half of them were the subject
3 of three or more infringement notices.

4 Let's turn to the business customers. Cox's policies
5 with respect to businesses were even more outrageous than with
6 the residential subscribers. For business customers, Cox had
7 no graduated response for copyright infringement. Cox's own
8 policies recognized that there may be excessive violations of
9 the policy and that yet, Cox was not likely to terminate a
09:56:34 10 business customer for DMCA violations.

11 Let's think about that for a minute. Cox's own
12 policy acknowledged that it was going to permit the
13 infringement to continue even though Cox knew it would be
14 excessive.

15 As you know, Cox didn't terminate a single business
16 customer. Cox claims that the reason for this is because those
17 services were too essential to cut off, yet Cox had no problem
18 terminating nearly 22,000 business customers for nonpayment.

19 The impact of not terminating business customers was
09:57:19 20 dramatic. Over 2,800 subscribers have been caught and reported
21 and yet not terminated, and when you look at the number of
22 notices they received in this chart, it is baffling.

23 Now, Cox has tried to defend this policy by claiming
24 that these businesses are using Internet service for essential
25 functions like police and fire, but they have no evidence that

1 they've put forward to demonstrate that. The only evidence in
2 the record is that Cox has no idea what its customers use the
3 service for, except for the one hospital that filed something
4 in this case where they said that they use the service for
5 public WiFi.

6 Moreover, you heard Dr. McGarty yesterday explain
7 that military bases, hospitals, police stations typically use
8 Internet2, not a commercial ISP.

9 The reality is that most of these customers could
09:58:14 10 never be described as critical infrastructure. As you look at
11 this chart, you'll see just some examples of the types of
12 business customers that are on the list. Some of them are
13 hotels. Some of them are pizza parlors. Some of them are auto
14 repair. Some of them are fraternities.

15 One of the things that you'll note in this chart is
16 that the number of warnings does not line up with the number of
17 tickets. According to Cox's policy, we should have seen a
18 warning for virtually every ticket other than the first, but
19 it's not even close. Cox wasn't even following their own
09:58:55 20 policy.

21 Cox's graduated response did not work. Just look at
22 the numbers. They're ridiculous. There is no way you can read
23 this chart that you saw before and believe that Cox was even
24 trying to stop the infringement. Under the graduated response,
25 there was essentially no subscriber terminations. It's

1 literally .0003 percent.

2 Even if omit -- even if you take out the deleted
3 blacklisted notices, Cox ignored, ignored 70 percent of the
4 notices. Leave aside the termination issue. They weren't even
5 acting on the vast majority of the notices they were receiving.

6 Ladies and gentlemen, responsible companies don't act
7 like this. They simply don't. The law is clear, but Cox
8 ignored it.

9 So I've told you now what the case is about. Let's
09:59:54 10 turn to what this case is not about.

11 Cox claims that it should not be held liable for the
12 actions of its customers. Remember Cox's opening slide and
13 Matt Carothers' testimony -- excuse me, Mr. Carother's
14 testimony? Internet service is so precious, it will only
15 terminate in extreme circumstances.

16 There are two problems with this argument. First,
17 Cox ignores and has not addressed the fact that the law
18 provides for a legal way for Cox to avoid liability, and you've
19 seen it in the documents and heard it from Judge O'Grady that
10:00:30 20 the DMCA contains a provision that allows ISPs to avoid
21 liability.

22 What that means in basic English is that for Cox to
23 not be held liable for subscribers who infringe a copyright
24 while the material is transported through Cox's system, we must
25 have a policy that provides for termination of service in

1 appropriate circumstances for repeat infringement. That's
2 Cox's language. That's Cox's language.

3 But in this case, Cox does not get the safe harbor.
4 So even though Cox had every opportunity to avoid liability had
5 it abided by the law, Cox wants you to give them that same free
6 pass as though they did.

7 Second, Cox does not treat internet connectivity as
8 precious when it doesn't get paid. It terminates almost
9 immediately. Cox's process for nonpayments is aggressive.

10:01:38 10 They send employees to the home to knock on doors to collect
11 payments. You don't hear them doing that to deal with
12 copyright infringement, do you?

13 Cox cannot both claim on the one hand that internet
14 connectivity is too precious to terminate, then simultaneously
15 terminate hundreds of thousands of subscribers in 30 to 44 days
16 after a bill remains unpaid. The takeaway from this is clear.
17 If Cox's money is at risk, Cox acts. If a copyright owner's
18 money is at risk, Cox doesn't act. We saw this double standard
19 over and over again throughout this trial.

10:02:28 20 What this case is not about, No. 2, CAS. CAS is a
21 side show. Nothing about it bears one iota on any of the
22 elements of the claim. The only real takeaway from CAS is that
23 Cox refused to participate, like the other large ISPs in the
24 country. CAS did not define what was acceptable under the law,
25 did not define how an ISP should act under the law, and did not

1 speak to the issue of whether Cox's policies were appropriate.

2 When Professor Almeroth testified that CAS was an
3 industry standard, he admitted he had zero idea of what the
4 industry was actually doing. He didn't know what other ISPs
5 were doing. He didn't know what the CAS ISPs were doing
6 outside of CAS. He didn't know any of that.

7 Respectfully, Professor Almeroth was in no position
8 to testify about what an industry standard was since he has no
9 idea what's happening in the industry.

10:03:30 10 Now, Cox says that CAS is relevant because it shows
11 that education is good and graduated response is good and no
12 termination is good, but here's the problem with their
13 argument: CAS does not erase the infringement that happened on
14 their network. CAS does not change the harm that was done to
15 the plaintiffs. And Cox can't use CAS as an excuse for their
16 violating the law, but that's what they're doing.

17 And remember the testimony that you heard. Even
18 Mr. Cadenhead, their former legal counsel for Cox, acknowledged
19 that CAS wasn't replacing the law. Mr. Marks, who led the
10:04:15 20 negotiations on behalf of the music industry, said the same.
21 And Mr. McMullan said that CAS didn't impact what ISPs had to
22 do under the law. And Mr. Zabek in an e-mail to his superiors
23 admitted that Cox had a more lenient policy than CAS.

24 What this case is not about: No. 3, spying and
25 privacy. This is a misleading nonissue, ladies and gentlemen.

1 Ms. Trickey testified that there were no privacy or
2 security issues associated with the RIAA notices. Privacy is,
3 by the way, another example of Cox saying one thing but then
4 doing another. Cox claims that privacy is critical to the
5 company, but then on cross-examination, it was revealed that
6 Cox allowed a privacy breach that was substantial enough to
7 warrant a federal investigation and a settlement.

8 And then Cox came in here and you heard them testify
9 that the disclosure of their subscribers' information, private
10:05:31 10 information was quaint.

11 All of these arguments -- CAS, spying and privacy,
12 and the desire to get a free pass -- are just an attempt by Cox
13 to distract you from the real issues in the case and the
14 elements of the claims.

15 Let me now turn to the issue of willfulness. After
16 determining that Cox is liable for either contributory
17 infringement or vicarious infringement, you will be asked to
18 determine if its conduct was willful. As the judge has
19 informed you in his instructions, the legal question for
10:06:15 20 willfulness is whether Cox knew that its subscribers were
21 infringing or acted with reckless disregard for the
22 infringement of plaintiffs' copyrights.

23 There can be no doubt that Cox knew that its
24 subscribers were infringing. You've seen it in e-mail after
25 e-mail and testimony after testimony. Cox received hundreds of

1 thousands of notices but did all it could to avoid terminating.
2 Cox's policies were a complete sham, and it did virtually
3 nothing.

4 These -- the evidence speaks for itself, but let me
5 review just a few of them. Recall the e-mail from Mr. Zabek
6 where he said: I know the P2P battle versus the copyright
7 holders is lost, but I have to do my job.

8 Or Mr. Zabek's e-mail about: Guidelines are meant to
9 be broken or changed if it does not help the customer.

10:07:09 10 Or his e-mail: DMCA equals reactivate.

11 Or Mr. Sikes, who sent an e-mail that said: This
12 customer is well aware of his actions and is upset that after
13 years of doing this, he's now been caught.

14 Or the customer who said: I have a uTorrent
15 application on my computer that's been there for a couple of
16 years. If P2P is illegal, kiss my -- you know what.

17 And last but not least: This will be the third time
18 that her son has reinstalled the BitTorrent client after she
19 has uninstalled it.

10:07:47 20 And then they reactivated the customer.

21 There can be no doubt as to willfulness in this case.

22 As Judge O'Grady has explained to you, there are two
23 different statutory damage ranges, depending on your
24 determination of willfulness. If you determine that the
25 conduct was non-willful, you will be allowed to award damages

1 between 750 and 30,000 dollars per work. If you determine that
2 Cox's conduct was willful, then you will be allowed to
3 determine damages per work between 750 up to 150,000 per work.

4 The judge has listed for you in his instruction a
5 series of factors that you should look at in considering
6 damages, and you should look at all of those factors because we
7 believe that each and every one of them weighs heavily on the
8 side of the plaintiffs, but let me speak quickly to just three
9 of them.

10:08:52 10 You heard from several representatives from the
11 plaintiffs, Mr. Kooker, Mr. Kokakis, and Mr. Flott, who told
12 you how peer-to-peer had harmed their business and that between
13 2004 and 2014, while music consumption was going up and up and
14 up, the music industry -- the record industry's revenues were
15 going down and down and down.

16 This was not a slow-down; this was a slaughter. Lost
17 jobs, lost labels, lost revenue.

18 Now, Cox, of course, can't possibly imagine losses
19 like this, so Cox brings in an expert, Mr. Tregillis, who did
10:09:29 20 an analysis that is shamefully inaccurate. Mr. Tregillis
21 claimed that the actual harm was only roughly \$600,000 or so
22 because that was the number of notices that were sent.

23 Do you remember from my opening that I described that
24 each peer-to-peer user was like a private digital record store?
25 Mr. Tregillis would have you believe that each one of those

1 stores only sold one record. Absurd.

2 We have no logs, so we cannot count. Even
3 Mr. Tregillis admitted that. He says he has no idea how many
4 downloads there were. Notwithstanding, he put forward his
5 analysis. It's shameful.

6 We would love to be able to tell you the full and
7 precise amount of the harm that Cox's conduct inflicted on us.
8 Unfortunately, we can't because of the type of conduct at
9 issue, and that's why the law has statutory damages. You, the
10:10:26 10 jury, can award damages in the absence of information about the
11 precise harm and consider all of the factors listed in the jury
12 instructions.

13 But it is useful to consider one of Mr. Tregillis's
14 slides about Katy Perry and the track "Hot and Cold."

15 NOTE: Audio clip played.

16 MR. OPPENHEIM: I had to play some music. It is a
17 case about music, after all.

18 THE COURT: You're at about an hour now.

19 MR. OPPENHEIM: I'm almost done, Your Honor. Thank
10:11:05 20 you.

21 In this slide, Mr. Tregillis shows that the same user
22 was caught distributing the same song over the course of a year
23 and two months. I ask you, how many free copies of that
24 incredibly popular song you just heard could this subscriber
25 had distributed in a year and two months?

1 Let's turn quickly to Cox's revenues and profits.
2 Please pay attention to the end of jury instruction No. 28,
3 where the Court will instruct you that you may consider the
4 amount to have a deterrent effect, and when you consider that,
5 consider Cox's profits from its high-speed internet business
6 between 2013 and '14. It was \$8.3 billion. That is a big, big
7 number. All of Cox's focus on retaining customers and cutting
8 costs worked, or at least worked for Cox.

9 Mr. Bakewell criticized Dr. Lehr's analysis for not
10:12:00 10 considering costs, but these profit numbers account for them.
11 Cox's profits were so excessive that between 2013 and 2014, Cox
12 paid \$2.9 billion, billion with a "B," in cash dividends to its
13 owners. This is after costs, taxes, interest, and capital
14 investment.

15 If you remember nothing else about Cox's finances,
16 remember Cox had so much free cash on hand, it could pay its
17 shareholders 1 to 1.5 billion dollars a year while continuing
18 to grow the business and while the infringement continued
19 unabated.

10:12:38 20 Given Cox's conduct, how much of those profits should
21 the Cox family get to retain, and how much should be turned
22 over to the plaintiffs?

23 Cox's profits were massive. In fact, even if you
24 awarded the maximum statutory damages under willfulness, it's
25 not clear that even that would have a deterrent effect because

1 Cox has so much cash.

2 Nobody should accept Cox's after-the-fact excuses and
3 word games. This was not a momentary lapse. What happened at
4 Cox took place over a period of years. Just when you thought
5 Cox's conduct was bad, you see something else and you learn
6 that it got worse. Cox's decisions were made and ratified by
7 Cox's executives and employees from multiple departments at
8 multiple levels.

9 Cox's decision to put its own interest ahead of the
10:13:31 10 law is part of Cox's culture and thinking, and that needs to
11 change. While they may not have accepted responsibility during
12 this trial, you will have an opportunity to send a message and
13 force them to take responsibility going forward.

14 On the damages question, we leave it to you, the
15 jury, to determine the appropriate damages award. We believe
16 it should be at the high end of the range.

17 Before I conclude, I want to harken back to a point I
18 made in my opening that's important for your consideration.
19 This is not a case just about the record companies and music
10:14:07 20 publishers. It's about the musicians and everyone around them
21 that help create the magic of music that's part of our lives.

22 As I said, for every Justin Timberlake, there are 20
23 or 100 other artists who have recordings and songs that people
24 listen to who do not have the fame and success. For every
25 Rolling Stones, there's a team of other creatives from union

1 musicians to digital production engineers who rely on the
2 revenue that comes from selling music. There are scores of
3 people who create the music that has become a part of our lives
4 and history. These are the people who lose out each time music
5 is shared illegally on Cox's network. These are the people who
6 will get paid by virtue of this justice being done here today.

7 On behalf of our clients, our artists, and all of the
8 creative people in the music industry, thank you.

9 THE COURT: All right, thank you.

10:15:00 10 All right. Let's take a ten-minute recess, and then
11 we'll come back and we'll hear further argument. All right.
12 You're excused. Thank you.

13 NOTE: At this point, the jury leaves the courtroom;
14 whereupon, the case continues as follows:

15 JURY OUT

16 THE COURT: All right. Anything before we recess?

17 MR. OPPENHEIM: My apologies for going over, Your
18 Honor.

19 THE COURT: That's all right. I just wanted to let
10:15:46 20 you know. I wasn't sure how much more you had left.

21 All right. Let's take ten minutes. We're in recess.

22 NOTE: At this point, a recess is taken; at the
23 conclusion of which the case continued in the absence of the
24 jury as follows:

25 JURY OUT

1 THE COURT: All right. Joe, let's get our jury,
2 please.

3 NOTE: At this point, the jury returns to the
4 courtroom; whereupon the case continues as follows:

5 JURY IN

6 THE COURT: All right. Please be seated.

7 Mr. Elkin, please proceed.

8 CLOSING ARGUMENT

9 BY MR. ELKIN:

10 May it please the Court. Counsel. Ladies and
11 gentlemen of the jury.

12 Wow, it's been a whirlwind. I'm sure over the --
13 when you walked into the doors of the courthouse almost three
14 weeks ago, at least two-and-a-half weeks ago, you probably
15 didn't quite know what to expect. Some of us didn't either, by
16 the way. And now the only thing standing between you and the
17 holidays is your deliberations and returning a verdict.

18 And before I forget, I want to wish each and every
19 one of you a very happy holiday. I know you've worked hard.
20 The lawyers, the Court has worked hard, as Mr. Oppenheim
21 mentioned. And I'm personally looking forward to spending the
22 time as well with my family.

23 One of the great things that I get to do this time of
24 the year is to spend time with my father-in-law, who is 93
25 years old, great guy. He's part of the greatest generation,

1 and I spend a lot of time talking to him about his life. And
2 one of the things that he always sort of harkens back to is the
3 time that he spent in the service. He signed up, along with a
4 number of his buddies, after Pearl Harbor, and he enlisted in
5 the Navy. And after spending a little time in Hollywood,
6 Florida, to learn how to become a radio man, he was dispatched
7 to the Pacific theater.

8 And he flew in one of those countless missions, those
9 TBF, Grumman TBF aviators, the three-man airplane that we have
10 a gunner and a pilot and a radio man, sort of like the one
11 George H. W. Bush sort of flew in. And he would tell me -- and
12 he still goes back to these stories, it's like the most
13 important thing in his life, other than his family -- about how
14 he was sort of stationed in the belly of the tail on this bench
15 with the -- doing the radio thing and having a -- and the gun
16 out of the airplane, and being there for hours.

17 And I would say, how did you do that? What was this
18 all about? How could you sustain yourself? And he said, I
19 wouldn't really think about it. We were all very patriotic, we
20 cared about our country, we signed up and we served. And we've
21 got precious freedoms.

22 And I think about that every time I have the honor to
23 address a jury. It's an honor for me to be able to stand
24 before you. This is a great, great hallmark of our democracy,
25 to be able to take men and women from the community, different

1 sections of life, and come together and hear an important case
2 for both sides, and you get to make that decision. There's no
3 other country in the world that allows this.

4 And make no mistake about it, I believe this with
5 every sort of fiber in my being. This is not simply
6 platitudinal. You know, this is what you all are, this is
7 democracy in action. Thank you for your service.

8 I'm going to highlight some of the evidence in the
9 case, and I want to focus on the quality of the evidence, not
10 simply evidence. You can't divorce yourself from the quality
11 of the evidence compared to just snippets on slides, whether
12 that's the case for me or opposing counsel. It's not about
13 feathers and it's not about music medleys. It's about equity,
14 fairness, and justice.

15 Now, as you consider the evidence, consider what each
16 of us said at the beginning of the case. What was our promise?
17 What was each side's promise? And did we delivery on that
18 promise?

19 We promised that you would not see sufficient
20 evidence with regard to the material contribution, or that
21 there would be control over the infringements. And we focused
22 on the reliability, not whether there is infringements, but the
23 reliability of the MarkMonitor system as applied to Cox.

24 The other side talked about swarming with piracy, and
25 said one thing and did another, and put its profits above the

1 law. And we just heard that refrain again.

2 But you were here, you saw the witnesses, one after
3 the next. Were they credible? Were they substantial? Some of
4 these men and women from Cox had been with the -- has been with
5 the company 15, 20, 25 years. You heard their testimony, you
6 heard them on cross-examination.

7 I want to focus on the two claims initially, the
8 contributory and vicarious infringement. Specifically, I'll
9 start with contributory liability. And the judge has given you
10 a definition of that in your jury instructions. It includes
11 inducing, causing, or materially contributing to infringing
12 activity.

13 This case is not about inducement or causing, it's
14 about material contribution. And that's what both sides have
15 focused on.

16 With regard to the material contribution, in terms of
17 reviewing the evidence, there are five key facts that I would
18 call to your attention: First, Cox provides an essential
19 service.

20 Number two, Cox doesn't know what its subscribers are
21 doing on the internet.

22 Three, what Cox decided to do in addressing copyright
23 infringement on its internet was to develop a graduated
24 response program.

25 Fourth, the plaintiffs, as it turned out, that was

1 their response. When they had an opportunity to negotiate with
2 the ISP community, that's what they ultimately chose, graduated
3 response.

4 And then fifth, the system that Cox put into place
5 was effective, it was extraordinarily effective. And I'm going
6 to review the evidence with you today.

7 So going through those five elements in terms of what
8 the facts are, I'll start with Cox provides an essential
9 service. I don't think anyone disputes that, and I'm not going
10 to recount all the different ways that all of us use the
11 internet because that's self-evident.

12 Secondly, Cox provides a gateway to the internet.
13 That's what they do. They don't edit content. They don't host
14 content. It provides a mechanism for individuals to access the
15 internet.

16 And as you've heard from many witnesses, Cox doesn't
17 track what its customers do online.

18 Now, Mr. Carothers, in his testimony, took you
19 through that. I asked him: Does Cox track what its users are
20 doing online with Cox's broadband system?

21 Answer: It doesn't.

22 Question: Why not?

23 Two reasons, one is lack of technical capability to
24 do so, and the second is that we have very strong privacy
25 policies.

1 And Cox would not spy. And I would say to you,
2 ladies and gentlemen, today's day and age, with data privacy
3 being more and more important, Cox shouldn't have to track what
4 its customers do online.

5 Now, Linda Trickey, who was Cox -- who is Cox's
6 privacy counsel, in her testimony stressed the importance of
7 privacy.

8 She also explained that Cox couldn't block internet
9 traffic or throttle bandwidths. Both she and Dr. Almeroth
10 explained to you that net neutrality was very much an issue
11 during 2013 and 2014 despite some earlier court action.

12 And you know, trials are a funny thing. There's
13 always something very unexpected that happens. And the most
14 un-expecting things can create a window of insight.

15 When Ms. Trickey was on the stand after her
16 cross-examination, when she was confronted on cross-examination
17 by opposing counsel with a long list of notices related to
18 infringement of a customer, which turned out to be a university
19 housing customer, she didn't know what question I was going to
20 ask her. She thought I was going to blurt out the name. And
21 which she said, and this is in the transcript: I need -- I
22 just want to say something. I don't know where you guys ended
23 up on this, but you shouldn't say the name of a customer. You
24 can say the type of customer, but you shouldn't say the name.

25 Even when it benefitted her, even when she was

1 probably dying for everybody to know the name, she was very
2 careful for me not to elicit that.

3 As you heard from Matt Carothers, the internet can be
4 dangerous in so many ways. He developed CATS and graduated
5 response to deal with this. And let's be clear, it was first
6 in time and best in class. This mechanism was licensed to
7 other ISPs, including Spectrum. And as Mr. Carothers said,
8 this -- he was -- this was -- Cox was the first to develop
9 graduated response.

10 And Ms. Trickey also commented on this in her
11 testimony that Cox was the first ISP to roll out graduated
12 response.

13 And as you've heard from all the testimony, graduated
14 response at Cox was quite robust. There were tickets. There
15 were warnings. There were soft-walled and hard-walled gardens.
16 There was intensified discussions with skilled folks who could
17 have those discussions. There were suspensions. And in
18 certain circumstances there were terminations.

19 And CATS, as you've heard from Mr. Beck, CATS could
20 handle a lot of complaints, millions on a yearly basis, from
21 all sources. And you heard witness after witness discuss how
22 seriously Cox took copyright infringement notices and how the
23 system worked.

24 Now, Randy Cadenhead testified about this.

25 Okay. Well, let's just move on.

1 He talked about how the human touch was fundamental.
2 When he was asked the question by opposing counsel: If Cox
3 really wanted to stop the infringement on its network, wouldn't
4 it want to learn as much of the infringement as it could so it
5 could respond to as much of this as it could?

6 And he responded: I know that the human touch was
7 part of the process, was a fundamental thing, that Cox believed
8 that was the most effective way in the long term to get
9 results. And you may disagree -- referring to opposing
10 counsel -- but there are, I know, anecdotally of instances in
11 which human contact made a difference and some indications in
12 which, unfortunately, bad things happened before human contact
13 occurred.

14 Now, Jason Zabek discussed how seriously he took his
15 responsibilities.

16 I guess that's not being played either.

17 Question: Would you have done this job had you not
18 wanted to take copyright infringement seriously?

19 Answer: I love this job. I would have done it no
20 matter what. You could have probably paid me less, I would
21 have done it.

22 These folks worked hard. They were demonized over
23 and over and over again. These guys worked really hard, and
24 they spent years and years and years toiling in the vineyards
25 at Cox, working with customer abuse.

1 And the safety team was always trying to do the right
2 thing. A question put to Mr. Zabek: Do you know whether Cox
3 could automatically terminate a subscriber based on a copyright
4 infringement complaint?

5 Answer: We always want a human to review.

6 Question: Why? Why is that?

7 Answer: To make sure that we were doing the right
8 thing.

9 Now, Carothers analyzed the numbers of reducing
10 infringement and found the system very effective in stopping
11 infringement. Question -- he testified: The program was very
12 effective. That the vast majority of customers never made it
13 past the e-mail warning stage.

14 And I asked him how he knew that. And he said he ran
15 the numbers himself. And you heard the testimony, the
16 specifics about how he ran the queries. He went into great
17 technical detail.

18 There's some insinuation today that somehow because
19 there was no formal report or study, someone is incapable of
20 actually running a bunch of queries and ensuring themselves
21 that, in fact, the numbers are going down. But we have an
22 independent study, which I'll get to in a moment.

23 The inventor of the system, Mr. Carothers, agreed
24 that the safety team took infringement notices seriously. He
25 hired these folks. He wanted this to be a success. He was

1 proud of what he did.

2 Now, Ms. Trickey, who helped to oversee the -- this
3 program, she attested to the seriousness with which Cox took
4 infringement issues. And she stated before you, she testified
5 in response to a question by opposing counsel: Do you know
6 whether Cox ever had a practice whereby it would turn a blind
7 eye to copyright infringement of its customers? I believe that
8 was my question.

9 She said: The fact that you're creating a process
10 that no one else had even done that yet shows that you didn't
11 turn a blind eye, you actually took it seriously.

12 Now, we've heard at opening argument and closing
13 argument today, and now throughout the trial, that the
14 plaintiffs criticize Cox's system in a number of ways. They
15 have a number of complaints, and I will address some of them
16 here in the interests of time. But I would submit to you all
17 that this is, respectfully and advisedly, disingenuous and
18 pretextual.

19 First, they talk about Cox not processing notices.
20 That's a big refrain. But there's no question that Cox
21 processed all of the RIAA notices. They processed all of the
22 notices that were sent in this case. That fact is un-rebutted.

23 And you heard Randy Cadenhead testify how seriously
24 he took the RIAA and their concerns. He was asked at the
25 beginning of the claims period by Ms. Sheckler of the RIAA, who

1 wanted to go from the existing 400 to 500 to 600 notices a day,
2 and he responded, and you have this e-mail: I checked with our
3 technical team. We do want to be as helpful as we can. They
4 think we can try accepting 600 per weekday. Does that sound
5 okay? That's how he responded.

6 And in response to my question at his deposition why
7 he simply didn't accept 500 a day when that was her initial
8 request and instead go up to 600, he said: I had a lot of
9 respect for her and for the people she works for, and their
10 concerns and their needs, and I was trying to be helpful.

11 Does this seem like a company who doesn't care about
12 the recording industry? And he was in charge of supervising
13 the safety team at the time.

14 You saw the correspondence between Cadenhead and
15 Sheckler. They agreed to 600 notices a day for the claims
16 period.

17 And the truth is, as you saw from Dr. Weber's
18 analysis, on average during the claims period they didn't even
19 get to 600. It was like 450 notices per day, and all of them
20 were processed.

21 Then, next complaint, they complain about rolling up
22 the complaints, aggregating the complaints.

23 But Carothers explained why Cox does that. Question:
24 Why does CATS aggregate complaints rather than treating each
25 one as a separate incident?

1 Answer: Fairness for the customers. If every single
2 notification generated a new ticket, then we could potentially
3 have someone go through all the steps of the program through
4 termination within a few minutes before they even had a chance
5 to look at the issue.

6 What's interesting is that under CAS there was a
7 seven-day grace period built in so that they would give
8 customers an opportunity to do something about it. They didn't
9 want to flood customers.

10 So they're complaining about Cox actually aggregating
11 complaints when this was the system that they proposed and
12 accepted on an industry-wide protocol.

13 Now, the hold for more, the so-called -- we only send
14 out a warning to customers after they get the second one, Mr.
15 Carothers testified in detail about this: The hold for more
16 was justified given no statistical significance between the
17 first and second notices.

18 And Lynne Weber's study, which I'm going to get to in
19 a moment, confirms this.

20 And Mr. Carothers testified: The finding was that
21 there almost no difference in the number of customers who
22 repeated -- who repeat offended between those who had, who had
23 received a first notice and those who had not -- and those who
24 had not received a first notice.

25 Question: Did you personally do this work yourself?

1 Answer: I did.

2 There is a reason why a lot of the notices didn't go
3 out after the first complaint. Because there was never a
4 second complaint. If there was not a second complaint, then of
5 course no notice would go out.

6 But he looked at the tickets and he determined that
7 it was wasteful to do that and of no moment. And that policy
8 had been in effect for many, many years before the claims
9 period.

10 Then, then, you heard it today, they complain that
11 moving folks from the Tier 2.5 to Tier 2.0 is proof positive
12 that Cox didn't care about infringement. But Mr. Zabek
13 explained that that's wrong, that they were using more and more
14 automation, which was approximately 90 percent of processing
15 all of the tickets.

16 Then Mr. Vredenburg, who was part of the 2.5, told
17 you in open court that when folks were shifted from 2.5 to 2.0
18 where they could still handle copyright tickets, it didn't
19 affect their ability at all to process the complaints.

20 Then another complaint, they complain that Cox was
21 obligated to terminate under its agreements, but didn't follow
22 its rules. But this grossly mischaracterizes what happened, as
23 Ms. Trickey testified to you. Question: In the circumstances
24 when a customer violates the AUP, do you have an understanding
25 as to what steps Cox will take?

1 Answer: The goal is to reach out and to educate and
2 modify behavior. She said that consistently.

3 And under cross-examination, Ms. Trickey testified
4 about the lengths to which they would try to educate customers
5 and try to work with their customers: And so, under this
6 policy as it existed on November 1, 2012, et cetera, et cetera,
7 you know, shouldn't you just terminate them?

8 Answer: You prefer to try to work with them and,
9 again, educate them, modify their behavior, and help them. You
10 never want to terminate anyone.

11 You want to fault Cox for that? Fine. But that's
12 what they were trying to do.

13 And you heard from Joe Sikes, also explaining the
14 importance of working with customers to change their behavior.
15 Mr. Sikes testified that: The number of subscribers that were
16 reaching, you know, the point of the process were pretty
17 limited. It was a small amount. So I didn't really see it so
18 much as saving every little -- every single little customer.

19 And he goes on to say: I mean, that was what was
20 important to us. We wanted -- we wanted them to understand the
21 importance and that they needed to take action.

22 Now, Mr. Vredenburg, who lived in this world, lived
23 in the Tier 2.5 world, explained that it was worth working with
24 the customers. He didn't want to terminate them if he could
25 avoid it. It was the last resort. And there were plenty of

1 good reasons for it. There were plenty of good reasons for it.

2 You have got back in the jury room some 1,700
3 complaints, customers' responses where they went on record when
4 they received notices from Cox. The notion that somehow every
5 ticket is an infringement and we should just accept it, is
6 really beyond the pale.

7 Here is one example that was sent during the claims
8 period from a customer who was accused of copyright
9 infringement: We are senior citizens, 77 and 74, and wouldn't
10 even begin to know how to do what is set forth below.

11 Here is another one during the same time frame: I
12 have read this e-mail and found the content and deleted both
13 the source and material. I am 61 years old and not in the
14 habit of allowing my nephews to use my computer; however, not
15 anymore.

16 Now, Joe Sikes explained why he wasn't prepared to
17 take quick action to terminate permanently.

18 NOTE: At this point a portion of a video recording
19 is played into the record as follows:

20 Q. Do you think that reactivating a customer who has twice
21 been terminated for copyright abuse is an effective way to
22 defer -- deter that customer from further copyright
23 infringement?

24 A. In most cases the customer, the account holder, the
25 subscriber wasn't the person that was responsible for the

1 activity or that was causing the activity. It was usually
2 someone in their home, someone outside of their home, someone
3 who had access to a network. In some cases it was a computer
4 virus. We didn't feel like it was fair to -- to punish a
5 customer that was in that situation. Now, if it was a customer
6 that said, yes, I'm doing this and you can't stop me, any case
7 that I was aware of in that circumstance, the customer was
8 terminated.

9 NOTE: The video recording is concluded.

10 MR. ELKIN: And then, and then, and then there is the
11 complaint about Rightscorp. Here you have a chorus, a chorus
12 of Cox folks who were quite animated about their feelings
13 because of what -- how they perceived this particular notice
14 sender.

15 Linda Trickey noted when she testified that: They
16 were the ones -- that they also -- that they had a demand for
17 money in their notice. And, you know, we told them we wouldn't
18 process it. They even offered us a scheme at one point where
19 they said, if you process these with the demands, you know,
20 we'll give you essentially a kickback.

21 Mr. Carothers characterized these notices as
22 threatening. He thought it was a shakedown. And he said in
23 addition to that, it invited unsuspected Cox customers to hit a
24 link, and who knows what would have happened from that point
25 forward.

1 Mr. Carothers further testified that after turning
2 down this scheme, Rightscorp intentionally flooded CATS with
3 notices.

4 Question: What happened next?

5 Answer: They offered to cut us in for a piece, and
6 we turned them down too.

7 Question: Then what happened? We had to block them
8 because it was a denial of service attack on CATS.

9 And then -- and poor Mr. Beck. They shut his system
10 down. The volume -- he testified: The volume of complaints
11 that we received from Rightscorp shot up dramatically and went
12 to -- went up to the high enough volume that we were no longer
13 able to take in any new abuse complaints from any senders for
14 any type of abuse at all.

15 And, of course, they brutalized Jason Zabek and
16 Joe Sikes for their intemperate e-mails about Rightscorp. And
17 it's true, they were upset. And, yes, they said some goofy
18 things in those e-mails. I have said goofy things in e-mails
19 when I have been upset.

20 I run a law firm of 1,000 lawyers, and I will tell
21 you, I've seen and continue to see a lot of goofy e-mails,
22 sometimes even from my partners, who I love.

23 But at the end of the day, there are good and
24 sufficient reasons why they were upset. And if you want to
25 hold those intemperate e-mails against Cox, then I don't know

1 what I can say about that. But they were quite upset.

2 And, of course, the plaintiffs agreed years after Cox
3 rolled out its system of graduated response that lo and behold,
4 that's a pretty good idea. We are going to do it ourselves.

5 And this was -- they reached an agreement with --
6 we're talking about the RIAA, 85 percent of the music industry.
7 And you've got these five ISPs, AT&T, Verizon, Comcast, Time
8 Warner Cable, and Cablevision, basically 70 percent of the ISP
9 community. If this is not an industry standard, I don't know
10 what is.

11 And this wasn't some fly-by-night experiment. This
12 was something that was negotiated for years, lasted for years,
13 and was extended six times.

14 And CAS will -- I asked Mr. Marks about this. Let's
15 be clear, CAS was all about, all about repeat infringement. He
16 knew it was pervasive infringement.

17 And plaintiffs thought CAS went beyond education to
18 enforcement. He testified in direct, and I asked him again on
19 cross-examination, and he testified that, yes, it had teeth in
20 it. And we all know from listening to the testimony that they
21 were guided in this effort by Cox's success.

22 Mr. Cadenhead made an extensive presentation, and you
23 saw it, and he stated: I felt like we had a pretty good
24 example of one way that ISPs could respond fairly, and what we
25 felt was effectively to a problem that needed addressing.

1 Now, Cox didn't participate because it felt it had a
2 better graduated response program. And he stated, and you
3 heard: I felt like the process we had designed was better.

4 Let me show you an e-mail that I think was just
5 exhibited on closing argument. And they used this e-mail both
6 with Mr. Zabek and Dr. Almeroth, but they omitted key language
7 from this e-mail that has a bearing on this particular issue.

8 This was an e-mail that Mr. Zabek sent to others at
9 Cox on February 28, 2013. And what they left out, and this is
10 referencing the Copyright Alert System: Luckily, 80 percent of
11 our customers, meaning Cox's customers, that share copyrighted
12 material, stop by the second warning. At each step we educate
13 them on the illegal activity and our AUP. What this new
14 Copyright Alert System has done is copy what we have been doing
15 for years with some slight modification with each ISP.
16 Randy Cadenhead was part of the discussions surrounding this
17 new system. He helped to mold part of that agreement.

18 That's what they didn't share with you when they
19 showed you that document.

20 Now, CAS, let's be clear, has fewer steps than Cox.
21 And we believe that's a fault, not a benefit. There is -- you
22 don't have anywhere near the kind of customer interaction and
23 intensity. And, frankly, it's just not as robust as Cox's
24 graduated response.

25 They agreed, basically, to warnings. And then after

1 the sixth notice, they just gave up. There was no termination
2 of internet service or anything beyond the initial mitigation
3 step.

4 Now, Marks admitted, Steven Marks of the RIAA
5 admitted in his testimony that there were limits on the number
6 of notices that ISPs had to accept, just like in the Cox
7 system. And while they didn't want a limit, they accepted it.

8 And not only was the MOU explicit on this, it further
9 provided that the ISPs, even with the notice limits, even with
10 the notice limits, could further reduce how many notices they
11 would receive based on the business and technical constraints,
12 including pressure on customer call centers. Does that sound
13 familiar?

14 And there was no requirement to terminate for a
15 repeat infringer. That is true under all -- I showed you all
16 of the implementation agreements with Verizon, and Time Warner,
17 and Comcast, and Cablevision, and AT&T, no requirements at all.

18 And a typical provision that you see in the Verizon
19 implementation agreement is that after the notices, there is a
20 temporary redirection to a landing page until the subscriber
21 contacts the participating ISP, and then they continue to go
22 on.

23 And while plaintiffs believe that CAS -- and also
24 they believed -- this was not something that they were trying.
25 They believed that graduated response was going to have the

1 effect of getting rid of what I refer to as the worst of the
2 worst.

3 They -- the Center for Copyright Infringement, and
4 this is in evidence, posted on their Web site frequently asked
5 questions. And they state right then and there that: We
6 anticipate that very few subscribers, after receiving multiple
7 alerts, and there was a total of six, will persist or allow
8 others to persist in the content theft.

9 Now, let's compare the two programs related to the
10 evidence that you have, CATS versus CAS. Under the Copyright
11 Alert System, you've got, again, six steps.

12 And I asked Mr. Marks: The implementation agreements
13 with the five ISPs did not require, by the terms of those
14 agreements, anything for the ISPs to do after the sixth alert;
15 is that correct?

16 Answer: Yes.

17 That was done. What Cox provided for were e-mail
18 warnings, suspensions with limited warning pages, suspensions
19 and requirement to call a support technician, suspension and
20 required to call to a specialized technician, and then
21 consideration for termination.

22 And if you take a look just at -- just checking the
23 boxes in terms of some of the characteristics, there is nothing
24 that CATS didn't do that CAS did. It did a lot more. It also,
25 actually, even considered for termination and did terminate in

1 certain cases.

2 And CAS, let's be -- CAS was in effect during the
3 entire claims period and beyond. It was negotiated for years,
4 as I mentioned. It lasted for years. And it was extended six
5 times.

6 So if both Cox and the plaintiffs agree, if they both
7 agree, which they did, that graduated response was the answer,
8 how did they do? How did Cox do?

9 Mr. Carothers testified before you, very effective.
10 He ran the numbers himself.

11 And then you've got Dr. Weber's study. She found the
12 success rate was 98 percent, 98 percent after going through the
13 process of the steps laid out in Cox's graduated response.

14 I would say it was extraordinarily effective. And
15 this accounts for the notices during the claims period.

16 And contrary to what you heard, she testified and she
17 took you through all of the additional steps that she
18 implemented in order to address any claim so-called bias.

19 And specifically she found that with one or more
20 tickets, you started out with 42,025. Three or more tickets,
21 18,600. So you see the precipitous drop-off between one and
22 three.

23 And then when you get to five, it's 10,208. Major
24 reduction. And by the time you get to 13-plus tickets, it's
25 1,330. That's a huge reduction. Anybody saying the system

1 didn't work is just not paying attention.

2 Now, her opinions of -- some of her opinions included
3 that after each step in Cox's graduated response, fewer
4 subscribers continued to be the subject of copyright
5 infringement notices. And by the 12th notice, the notices
6 stopped for the vast majority of subscribers. That was her
7 finding.

8 So, question, what happens after CAS runs its course?
9 Well, Mr. Marks testified: We continued to send notices.

10 Well, that's good. But Cox continues to engage. Cox
11 continues to engage and ratchet up the level of intensity with
12 its customers to try to get a better result. Why? Why do they
13 do that?

14 As you heard from Carothers, from Trickey, from
15 Sikes, from Zabek, from Cadenhead, it works. Mr. Cadenhead
16 again stated: I know that human touch, as part of the process,
17 was a fundamental thing. Cox believed that was the most
18 effective way in the long term to get results.

19 Now, even their expert, even Dr. McCabe attests to
20 the significant run-off. His was not 98 percent. His was
21 92 percent-plus, after the repeat infringers go through the
22 gamut of graduated response steps.

23 So what are plaintiffs left with? What are they left
24 with at the end of the day in the face of these results? Cox
25 had 49 subscribers with 100-plus tickets. How many times have

1 you heard that over and over and over again? But let's examine
2 the evidence on these so-called 49 customers that they keep
3 showing to you over and over and over again.

4 Of these 49, 15 are ISPs. Ten are university student
5 housing. Nine are hotels. Six are apartment complexes. Three
6 are military housing. Three are retail. Two is multifamily.
7 And one is a single family. And that's the subscriber that
8 they keep going over and over and over again as if, somehow,
9 you should believe that this was the entirety of Cox's
10 subscribership.

11 And Mr. Beck testified that 20 to 30 percent of the
12 tickets of the RIAA during this period related to business
13 customers.

14 Now, I'm going to turn to vicarious infringement.
15 There's a definition, of course, that you'll have to address.
16 Which is that in order to find vicarious infringement, you'd
17 have to find that Cox received a direct financial benefit from
18 infringing activity that Cox had both the right and ability to
19 control or supervise.

20 And we'll get to this in a bit, but at the end of the
21 day Cox was not supervising any infringing activity, had no
22 ability to monitor it, had no ability to verify it, period.

23 And in terms of financial benefit, simply because
24 revenue was recorded because somebody wasn't terminated,
25 doesn't create any causation. There is that word "direct."

1 Direct means causal.

2 So the notion that somehow, well, you were benefiting
3 because you could have terminated these, that's not the
4 standard.

5 Now, the RIAA wants you to believe that -- the
6 plaintiffs want you to believe that somehow Cox is manipulating
7 the subscribers to continue to infringe, and they promote it.
8 But the reality is that, as you've heard over and over again,
9 Cox had no control.

10 I want to point out the following with regard to
11 the -- what the evidence has shown here: Number one,
12 peer-to-peer piracy is pervasive. We all agree to that as a
13 basis.

14 Two, Cox doesn't track. There's no evidence to the
15 contrary with regard to that.

16 Three, you heard Mr. Negretti, head of product
17 marketing for this product, Cox does not market or advertise
18 infringing activity at all. No promotion.

19 And fourth, there was no direct financial benefit.

20 We'll go through the evidence, but Dr. Lehr's
21 evidence that he relied on from Mr. -- was taken away by Mr.
22 Mencher's testimony yesterday, completely contrary to what's
23 before you, and certainly no linkage. And he doesn't even
24 profess that there should be one.

25 In terms of whether peer-to-peer was an epidemic, I

1 think we can all agree that piracy, dating back to 1999, was a
2 problem.

3 In terms of peer-to-peer, Barbara Frederiksen-Cross
4 admitted that there were 30 million users of peer-to-peer at
5 any given time. Who knows what they're doing? There's no
6 question that there aren't legitimate uses of peer-to-peer. Is
7 it the vast majority? I don't know. Probably not. But to
8 suggest that somehow it's known, that can't be a correct
9 assumption. And in the meantime, you can't block peer-to-peer
10 for the reasons that were identified.

11 Now, Marks -- Mr. Marks, the other -- from the RIAA,
12 discussed all of the experiments that were undertaken by the
13 recording industry since 1999. Let's -- they sued Napster,
14 they put them out of business. And then Grokster. Then they
15 sued individual file sharers for five or six years. Then they
16 engaged in this notice program. And now they're suing the
17 ISPs.

18 And I asked them: What's going to be the next
19 experiment? This problem isn't going away. And as I posed at
20 the beginning, and I'll get to in a few minutes, this is a
21 shared responsibility. Everybody has got to play their part,
22 even the plaintiffs.

23 Now, the following evidence is completely
24 un-rebutted. Cox can't control the activity. It can't block
25 sites. It can't throttle speeds. It doesn't track, it doesn't

1 have the ability. And even if it did, it wouldn't do it
2 because of the privacy concerns. And as you have heard, not
3 all peer-to-peer activity infringes.

4 And Mr. Carothers testified that Cox doesn't block.

5 And Ms. Trickey testified that they can't block Web
6 sites or throttle bandwidths.

7 And Carothers confirmed, that didn't happen.

8 And Trickey explained in detail all about this.

9 Carothers testified that Cox lacked the ability and
10 wouldn't do it anyway due to the privacy concerns.

11 And Ms. Trickey agreed. She stated: Why don't you
12 spy on your customers? Because we believe they have a privacy
13 right in what they're doing online. We do not track or spy,
14 you know, the Web sites that they go to.

15 Now, there is no -- we talked about putting aside
16 control, you also have to find that they received a direct
17 financial benefit where they do control. Let's assume that
18 they do control, which they don't. There's no causal activity
19 here between receiving money and promoting or piracy. There is
20 no evidence that Cox promoted or advertised service to
21 infringe.

22 They had Mr. Negretti on the stand, they could have
23 asked him all kinds of questions. They didn't get one answer
24 that would have provided any scintilla of evidence to support
25 any such notion.

1 Mr. Bakewell eviscerated Dr. Lehr's analysis, as you
2 heard. And Mr. Mencher discussed how Dr. Lehr had all the
3 wrong facts with respect to Cox's expenses and the
4 infrastructure and all of that.

5 Now, Mr. Mencher explained that Cox, by the way,
6 would never do this. It's repugnant to the values of this
7 120-year-old institution.

8 A company, if you think about it for a moment -- and
9 Mr. Oppenheim is right, you can't -- you have to keep your
10 common sense here. Why would a company that is as profitable
11 as they say Cox is, and it's a great company, try to make a few
12 extra bucks on some infringing customers? Was it a head fake
13 that they were just trying to work with them and speak to them
14 and have all of these conversations with them with all of the
15 success that they achieved? It doesn't make any sense.

16 Mr. Negretti, who testified before you, head of the
17 internet product marketing, stressed this in his testimony:
18 Question: To what extent was Cox advertising lawful versus
19 unlawful downloading?

20 Answer: 100 percent lawful, 0 percent unlawful. We
21 don't create a marketing message in any away for customers who
22 are using it in any way other than in the most ethical ways.

23 And he further explained that advertising speeds
24 are -- is completely unrelated to any notion for -- as to a
25 draw for infringement. He explained that most of this has to

1 do with the streaming videos and streaming activities, and that
2 every single ISP is going to market speed and high-speed
3 internet. That's what you market.

4 In terms of direct financial benefit. Again, the
5 evidence is clear. There was no incentives to foster
6 infringement.

7 To the contrary, Cox introduced -- if there's any
8 doubt about that, Cox introduced graduated response and was
9 successful at it in actually reducing infringement.

10 There's no connection to customers staying online so
11 that somehow they could infringe.

12 Now, Sikes is -- they make some reference to some of
13 the e-mails of the customers, of the safety team, like Joe
14 Sikes. And he makes a reference to, let's be really careful,
15 this person pays X dollars a month. That's a far cry from
16 suggesting this company was in business to do this.

17 You saw Mr. Sikes on video. You saw an earnest guy
18 who was really working hard to do this. They can take snippets
19 out of context in e-mails and try to paint a different picture,
20 but think about the quality of the evidence, the quality of the
21 evidence, please.

22 And in terms of direct infringement proof, I want to
23 turn to that, and what is in the case and what is not in the
24 case. And specifically, I think there's a little bit of an
25 inadvertent mischaracterization of what we said at the

1 beginning of the case. We never said that there were no
2 infringements through Cox's system. To the contrary, that has
3 never been suggested.

4 What's been suggested is that the proof that they've
5 presented here or were going to present here and have presented
6 here is of a system, the MarkMonitor system, which otherwise is
7 good, but applied to Cox was bad because it didn't use the
8 mechanisms that they use under CATS. They use, under CAS, a
9 process called hash checking where you actually do the
10 downloads from the offending subscribers' computers.

11 Here they did hash matching, and that's the problem.
12 They're conflating the two, and that's our issue here.

13 First of all, there were no downloads, no e-mails,
14 and no screenshots.

15 So what we're left with is the MarkMonitor evidence.
16 And again, I think MarkMonitor may be a great company, but
17 the -- they're only as good as the technology that they employ.
18 And they did not use the same technology that they used in CAS
19 here. It's demonstrably unreliable for that particular -- in
20 this particular case.

21 And the operational audits that you've seen confirmed
22 that. They were supposed to hash check. They just hash
23 matched. And the auditor warned the plaintiffs about this.

24 And there is an incentive for them to cut corners
25 when they didn't have to do it. They had to do it under

1 CATS -- CAS, but they didn't have to do it with Cox. So they
2 cut corners.

3 If you take a look at this Appendix C, this RIAA rate
4 card, they decided to go cheap on this because they didn't
5 really care as much. They probably didn't think about a
6 lawsuit back in the day when this happened.

7 But at any rate, MarkMonitor's witness confirms that
8 they knew the difference. Mr. Paszkowski, who testified from
9 Lithuania, or wherever he was, basically stated that
10 downloading would be Level 5, and they applied Level 4.

11 Now, they elected not to do this, that was their
12 choice -- fine, by the way, they can do that -- except for 143
13 out of the 175,000-plus files. So for the vast majority, they
14 didn't do Level 5. I mean, nearly the entirety.

15 The MarkMonitor system of hash matching versus hash
16 checking is fallible. Let's be clear, you've heard it from
17 different experts. MarkMonitor relied on the notion, they
18 relied on the notion that something was what it purported to
19 be. But that turns out, as you've heard, to be a wrong
20 assumption.

21 And plaintiffs own expert, Barbara Frederiksen-Cross,
22 she had to admit that. Question: And what happened was we
23 searched on the SHA-1 hash and got two different works, right?

24 Answer: Or at least we got two different
25 identifications.

1 Answer: There does appear to be some error here,
2 yes, counsel.

3 And then she was confronted again and had to admit it
4 again. Question: We searched on the SHA-1 hash in the Audible
5 Magic spreadsheet, and we found Tammy Wynette, right?

6 Answer: That's my recollection, yes.

7 Question: Can we search on that hash -- referring to
8 some exhibit -- title and artist in the spreadsheet is "Lovely
9 Day" by Bill Withers, right?

10 She answers: Yes.

11 Now, Dr. Feamster explained to you why simply relying
12 on hash matching is deceptive. BitTorrent users lie. That's
13 how the system is set up.

14 Now, because it didn't check, MarkMonitor couldn't
15 tell whether the file possessed by a Cox subscriber was real or
16 fake.

17 And by the way, this analogy to teacher that I just
18 heard about the essay, a better analogy would be if you
19 actually -- if a teacher saw two essay papers and she had, for
20 example, similar fonts and type size, whether it would be the
21 same. It has nothing to do with the content, it has to do with
22 the file size itself.

23 And Dr. Feamster confirmed, it's quite likely that a
24 peer -- quite likely that a peer does not have what it claims
25 to be.

1 And again, the outside auditor picked up on this when
2 they did the testing. They were worried about a dishonest
3 BitTorrent client.

4 Now, we have gone through the evidence with regard to
5 material contribution. And that is to say, contributory
6 infringement and vicarious infringement. As we turn to
7 damages, I would like to -- and before I get to the specific
8 issues related to the economic loss that Dr. Feamster -- that
9 Chris Tregillis took you through yesterday, I want to talk
10 about the issue, what the plaintiffs could have done to try to
11 address the harm they now complain about. And that is pursuing
12 the so-called subscribers who are the worst of the worst.

13 The answer is that they could have done something
14 here if they really wanted to do something with the repeat
15 infringers or the ones that they're complaining about here.
16 They were set up to do it, they have done it in the past, and
17 they did not do it here.

18 First, as you can see from this call out, under the
19 MOU, there's -- with CAS, with the ISPs, the owners could
20 have -- they specifically carved out there ability to sue
21 customers.

22 And if you take a look at the FAQ, they specifically
23 say right on their Web site that: Copyright owners may seek
24 remedies directly against the owner of an internet account
25 based on evidence they may collect.

1 And as I mentioned, and as you heard from Mr. Marks
2 and other plaintiffs' representatives when they testified,
3 plaintiffs have a lot of experience in doing this.

4 And when they did this in the past and served Cox
5 with subpoenas to get the names of subscribers, unlike what
6 you've heard, Cox complies. Ms. Trickey testified that if
7 there is a John Doe complaint and there is a request for
8 customer information so that the record companies can sue them,
9 they provide that information.

10 Now, the plaintiffs have a wall of lawsuits. They
11 know how to do this. They filed more than 5,000 lawsuits
12 against individuals. Sony confirmed as well that they have
13 filed plenty of suits.

14 And it's Mr. Marks of the RIAA who led the company,
15 he ran the campaign when he was at the RIAA. And Marks
16 testified that despite getting the repeat infringer subscriber
17 information under CAS, they elected not to pursue them. And,
18 of course, they didn't pursue them against Cox either.

19 A question I put to him: Do you recall whether or
20 not the RIAA on the record labels' behalf ever instituted any
21 action here against any subscriber of each of these five ISPs
22 based on the information that was provided?

23 Answer: We did not.

24 He then goes on to say they didn't sue any of the
25 ISPs, unlike Cox, there as well.

1 Then another FAQ, they specifically identify a
2 mechanism to actually get the data. And they specifically tell
3 the community the following: As provided under current law,
4 copyright owners may also seek remedies directly against the
5 owner of an internet account based on evidence they may
6 collect. Because the vast majority of subscribers observe
7 copyright laws as a matter of course, and the participating
8 ISPs and content companies believe that even more will do so if
9 the Copyright Alert System is effective, it is reasonable to
10 expect that very few subscribers will ever face this situation.

11 That's what they were saying. But the truth is, as
12 we heard from Mr. Marks, they stopped doing this years ago.
13 They gave up on it. Which is fine, it's their prerogative,
14 their choice. But if they really wanted to go after the worst
15 of the worst, the ones that they felt still were doing it, they
16 had the ability to do something.

17 But we know why they didn't. Here is a second window
18 of insight in the trial. When Mr. Kokakis was on
19 cross-examination, he told us: They don't want to go after the
20 tens of millions of individual students and children and
21 grandmothers. That's not something we want to do.

22 And by the way, I respect that, but they're the ones
23 that have made that choice.

24 Then Mr. Kokakis doubles down on that and states
25 that, look, it's his right, their right to choose what they

1 want to do. And that's fine.

2 Mr. Marks agreed that it was bad PR.

3 So we are not saying, again, that they should go
4 after all of the subscribers. But if they truly had a problem,
5 again, with the worst of the worst, there are remedies here.
6 And that should have a bearing at how you look at the case.

7 Now, turning to economic loss. Of all of the factors
8 in your instructions that would guide you to where you would
9 award statutory damages -- and, again, I would ask you not even
10 to worry about that if you find -- in the circumstances where
11 you were to find Cox not secondarily liable for vicarious
12 infringement or contributory infringement. If you find that
13 Cox is not liable for contributory or vicarious infringement,
14 you need not consider, as the judge instructs, anything related
15 to damages.

16 But to the extent that you find that, and I would
17 urge you not to do that, if you agree with the case that we
18 have put on, of all of the factors that relate to statutory
19 damages that I suggest you consider, I would take a look at the
20 evidence pertaining to the loss attributable here to the
21 infringing activity.

22 It has got to be -- any notion of loss has to be
23 tethered to something that relates to the infringing activity.
24 It just can't be anything.

25 Now, we asked witness after witness on the

1 plaintiffs' side whether they could come up with any evidence,
2 any testimony, anything related to economic loss. As you see
3 from this snippet here, there wasn't any. And there is no
4 obligation for them to do so, but they could have tried to do
5 something.

6 But we did. We -- Mr. Tregillis provided a study.
7 He demonstrated to you the specifics of how he did this. He
8 did it yesterday. And he took you through -- he gave credit
9 for every single song that was in issue here, which was the
10 only proof that exists in terms of their potential loss.

11 And the talk about so-called displaced record sales,
12 we heard that from an earlier witness on the plaintiffs' side.
13 If you believe that, that they are displaced record sales, then
14 this is an appropriate way to look at this. And I will return
15 to this as we concern -- as we consider the verdict sheet.

16 Look -- and, by the way, we have no doubt that the
17 piracy causes issues to intellectual property. We -- that's
18 not why we're here.

19 But the tale of woes, I would suggest, is a bit
20 misplaced. One of the factors that you are instructed to
21 consider, if you get to this point in the case of willfulness
22 is the issue of deterrence.

23 And during this claim period, 2013 and '14, the world
24 changed, and digital downloads were overtaken by internet
25 interactive streaming. Which now, of course, has -- from the

1 Spotifys and the Pandoras and the Apples of the world, the
2 world has changed quite a bit.

3 And you heard different witnesses, from -- Mr.
4 Kokakis of UMG Publishing testify to that. And he specifically
5 talked about how there was an increase in digital in 2013.

6 And then I asked Mr. Kooker in his -- my examination
7 of him about whether or not this is even applicable anymore
8 given how streaming has taken over the world. And he stated
9 that in 2018 Sony had a 22.3 percent increase over the prior
10 year. And their 2 billion out of the \$3.9 billion that Sony
11 makes is based on things that no longer are even a part of this
12 case.

13 And in an irony, in an irony, he states that, in
14 fact, the popularity of the streaming services depends on the
15 widespread availability of broadband internet connections,
16 which is the ISP community.

17 I want to turn to some final points before I wrap up
18 here, which is as follows. And these are just things that I
19 would ask you to think about as you return for your -- for the
20 deliberations.

21 As I posed in the opening and as I made reference
22 earlier, this online copyright infringement is an epidemic.
23 There is no one party that can control this. It's a shared
24 responsibility.

25 And I submit, based on the evidence that we have

1 presented, and I hope that you conclude, that Cox did what it
2 thought was appropriate in the circumstances to discharge
3 whatever responsibility it felt it had. Clearly as much, if
4 not more, than what they expected from ISPs under an
5 industry-wide agreement during this same period of time.

6 Plaintiffs have dealt with a number of experiments
7 over the years. That's fine, I get that. But Cox recognized
8 the problem early. Cox recognized the problem before the other
9 ISPs, and actually did something about it.

10 And we cooperated with them on their notice program.
11 You saw the testimony of Mr. Cadenhead.

12 Now they try to shift all the policing to Cox. And I
13 just -- I would ask you to consider that when you go back in
14 the jury room and deliberate.

15 Another point that I ask you to think about is the
16 internet and what they're really asking you to consider,
17 cutting off someone's internet service. I would submit that
18 termination usually is not the answer, usually not the answer.
19 And Cox came to that conclusion as well.

20 If somebody wants to terminate -- you terminate
21 somebody, they walk across the street and sign up for Comcast
22 or -- what are we doing? The plaintiffs didn't require it
23 under the Copyright Alert Service.

24 And, frankly, we don't disagree with them. The worst
25 of the worst would not have been deterred. They could have

1 sued them. They decided not to. Fine. They had the data,
2 they could have done it. They never did it with the infringers
3 related to the other ISPs in CAS or here. But they expect Cox
4 to terminate subscribers even, as you've heard from Linda
5 Trickey, that we're talking about here are universities and the
6 like. They didn't require it under the CAS, and they didn't go
7 after any of the repeat infringers there.

8 The record companies don't want to sue them, the
9 grandmothers, the children, the students. Okay. Okay. But
10 let's consider that in the context of asking Cox to shut these
11 folks off of the internet.

12 Another point I would like to raise with you is --
13 has to do with Cox's graduated response. If what Cox did in --
14 Cox worked to try to reduce infringement through its graduated
15 response program. I would submit if what Cox did in carrying
16 out its job was fostering infringement, that's what they say,
17 then the record company, who was plagued with piracy, we don't
18 disagree with that, was complicit with the majority of the ISP
19 industry in contributing to infringement by adopting and
20 implementing CAS.

21 We don't think they were. The ISPs to CAS obviously
22 were not enabling infringement through graduated response, and
23 neither was Cox.

24 I want to talk for a moment, if I can, and call to
25 your attention and ask you to consider the effectiveness of the

1 graduated response system.

2 Here is Dr. Weber's picture in case you forgot her.
3 And what did Cox actually do relative to copyright infringement
4 claims? They developed a robust, first in time, best in class,
5 graduated response program that by all accounts was extremely
6 effective.

7 And according to plaintiffs' own expert, McCabe, the
8 number of Cox subscribers stopping infringement after going
9 through the gamut of graduated response was above 92 percent.

10 According to our expert, and you saw her, draw your
11 own conclusions, I thought she was not only credible, but
12 persuasive, the percentage of subscribers under her study who
13 stopped at this same point was 98 percent. 98 percent.

14 I don't know about you, and it has been awhile since
15 I have been in school, but back when I was in school, a 98
16 wasn't a C, or a B, or even an A minus. It was an A+.

17 Worried about the DMCA. You heard it a lot. It was
18 mentioned again. I just want to repeat this, although it's in
19 the Court's instructions. This is not an issue in this case.
20 Whatever e-mails you have seen making a reference to that, we
21 have got an obligation under this, we have an obligation under
22 that, it's irrelevant because there is nothing to do here --
23 the fact that an ISP like Cox could claim a safe harbor by
24 terminating all kinds of repeat infringers based on someone's
25 say so, is nothing you should even consider. It has no bearing

1 on this case.

2 And, frankly, it has no bearing at all on the CAS.
3 As you can see from reading the MOU, it was excluded.

4 So where does this leave us? The verdict. You will
5 have the verdict sheet to fill out. The Court is going to give
6 you instructions. I just want to review with you what this is
7 going to look like.

8 How do I reduce this a little bit? Is there a way
9 down? Thank you.

10 All right. So this is the verdict sheet you're going
11 to given. And if you agree with Cox that plaintiffs did not
12 prove by a preponderance of the evidence that Cox was
13 contributorily liable, you would check "no."

14 And if you agree with Cox that plaintiffs did not
15 prove by a preponderance of the evidence that Cox was
16 vicariously liable for infringement, you would check "no" to
17 that.

18 And then you are -- if you do that and that's your
19 verdict, you're done. You don't have to consider anything
20 else.

21 If you don't, then you're asked to consider the
22 infringement claims for 10,017 works, and how many of those
23 works should Cox be tagged with.

24 And then the next page is willful: Do you find by a
25 preponderance of the evidence that Cox's contributory or

1 vicarious infringement was willful?

2 I would hope that, first of all, that you answer no
3 to the first questions. But if you don't, that you would at
4 least, in the circumstances, find that they were not willful.

5 And then with regard to the statutory damages amount.
6 Given the fact that you're constrained by going to at least a
7 minimum of \$750 a work, if you were to multiply that by the
8 10,000 or so works, if you were to find that many was
9 infringed, that gets you to roughly more than ten times the
10 economic loss of the only evidence that's been presented in
11 this case. So it would be \$750. That's how you would fill
12 that out if you agree with us.

13 But again, you need not consider that in the
14 circumstances were you to find for us.

15 And finally, finally, I want to make just one last
16 point, if I can. As I mentioned at the outset, this is a huge
17 responsibility. Everybody thanks you for it. I'm thanking you
18 again for it.

19 Our system of democracy depends on you, and I know
20 you will take it to heart. The plaintiffs said this case was
21 important to them, and I don't doubt it.

22 I also asked Cox, through Mr. Carothers, whether this
23 case was important to Cox. This is what he said: Critically
24 important. We are concerned that it will set a precedent that
25 ISPs will be required to monitor their subscribers and try to

1 determine whether we are violating copyright -- whether they
2 are violating copyright. We're also concerned about the
3 precedent that ISPs might be responsible for crimes committed
4 by their customers. So if we, as an ISP, are responsible when
5 our customers violate copyright, what else might we be might--
6 what else might we be responsible for?

7 Now, what I would suggest to you is not whether this
8 case is important to the plaintiffs or, frankly, whether it's
9 important for Cox. I would rather ask you to consider the fact
10 that this case is important to all of us. The wrong message
11 here could have the effect of requiring ISPs to monitor what we
12 all do online. Cox did its level best in dealing with the
13 concerns of the music industry. Please do not punish them for
14 that.

15 Thank you.

16 THE COURT: All right. Rebuttal.

17 MR. OPPENHEIM: Your Honor, can we take a very short
18 break?

19 THE COURT: Do you want a break?

20 MR. OPPENHEIM: Please.

21 THE COURT: All right. All right, let's take ten
22 minutes, and we'll come back and hear our rebuttal argument.

23 NOTE: At this point, the jury leaves the courtroom;
24 whereupon the case continues as follows:

25 JURY OUT

1 THE COURT: All right. Let's take ten minutes.
2 We're in recess.

3 NOTE: At this point, a recess is taken; at the
4 conclusion of which the case continues in the absence of the
5 jury as follows:

6 JURY OUT

7 THE COURT: All right. Joe, let's get our jury,
8 please.

9 MR. OPPENHEIM: Thank you, Your Honor.

10 NOTE: At this point, the jury returns to the
11 courtroom; whereupon the case continues as follows:

12 JURY IN

13 THE COURT: All right. Please have a seat.
14 Rebuttal, Mr. Oppenheim.

15 MR. OPPENHEIM: Thank you, Your Honor.

16 REBUTTAL ARGUMENT

17 BY MR. OPPENHEIM:

18 We're right in the home stretch.

19 I want to pick up with where Mr. Elkin left off. In
20 conclusion, Mr. Elkin said to you, that this was an important
21 case for Cox because he's worried about it setting a precedent
22 that ISPs would have to monitor what their subscribers were
23 doing.

24 That's not what this case is about, not even in the
25 slightest. It's not even close. And the plaintiffs have never

1 suggested anything of the sort.

2 This is not about monitoring, and the plaintiffs
3 haven't asked Cox to monitor.

4 Nor is it about spying. I told you during my closing
5 argument that one of the three things that this case was not
6 about was spying. And where did Mr. Elkin go immediately in
7 his closing? Spying.

8 This isn't about spying. It's not about privacy.
9 This is about copyright infringement.

10 This case is also not about the Copyright Alert
11 System. Mr. Elkin spent quite a bit of time talking about the
12 Copyright Alert System.

13 But several of the things that he said to you were
14 misleading, to say the least. He said, well, look, this
15 industry agreed, it was an industry standard that agreed on six
16 steps, and there was no termination.

17 That's not what the evidence said. You heard witness
18 after witness say that what happened in CAS was the following.
19 There was an educational program for six steps. After the six
20 steps, then the ISPs had to abide by the law.

21 So for Mr. Elkin to suggest to you that CAS said, no
22 terminations, and they're done after six steps, is to
23 misrepresent the testimony that was put before you. Please
24 don't go there.

25 They also presented the notion that, well, under CAS

1 there were caps. And so, it's all right for Cox to have capped
2 the number of notices that it would receive.

3 I'd like pull up an exhibit that we looked at before
4 because I want us to really dig in on this for just one second.

5 Could you pull up PX 6, please.

6 This is the MarkMonitor agreement with the RIAA. And
7 I've asked to pull up the appendix, which shows the volume --
8 the anticipated notice volume for each of the ISPs. This is
9 the agreement for 2014.

10 And if you look at the top ISPs, you'll see that it
11 lists the CAS ISPs. And you'll see that those numbers per
12 month range anywhere from, at the low end, 17,000 a month to
13 57,000 notices per month.

14 Now, those were anticipated volumes, and that's what
15 Mr. Bahun told you. It wasn't caps. He told you that these
16 were anticipated volumes. Which is what the document actually
17 says. He said the only one that was a cap was Cox.

18 And if you look at Cox on the third line down in the
19 second section, you see it's 2,000 a month -- excuse me, 9,000.

20 To suggest that that's even remotely similar is to
21 mislead. It's not.

22 You can take that down. Thank you.

23 In his closing Mr. Elkin also referred to the fact
24 that Cox couldn't throttle because of net neutrality. There
25 are two problems with that. One is, you've heard testimony

1 that ISPs do throttle, other ISPs. It came up during the
2 trial.

3 The other thing is net neutrality. You heard the
4 testimony that there was an effort by the FCC in 2009 to fine
5 Charter Communications -- excuse me, Comcast, I apologize, for
6 bandwidth throttling for P2P usage. Which is exactly what
7 we're talking about here. And the FCC fined them. And it went
8 into court, and the D.C. Court of Appeals in 2011, and this
9 came out in the testimony, the D.C. Court of Appeals in 2011
10 said that the FCC did not have authority to fine the ISP for
11 doing that.

12 So the notion that net neutrality restricted Cox's
13 ability to take action here is just not true.

14 I want to move off of the issue of the Copyright
15 Alert System and now turn to the issue of whether or not
16 graduated response was effective, which Cox claims that it was.

17 The analysis that you were shown was from Dr. Weber's
18 numbers. And we've already talked about how those numbers were
19 skewed. If you take out a third of the data that is the worst
20 for you, your numbers aren't going to look very good.

21 But there's actually a more fundamental problem.
22 Right? Your data -- your analysis is only as good as your
23 data. And if you've got a filter that limits the amount of
24 data that you're looking at in the first place, then that's
25 going to impact what you see.

1 So if what you're looking to see, as Mr. Elkin
2 presented, whether there's repeat infringers, having a filter
3 that limits the number of notices that come into the dataset in
4 the first instance has a dramatic impact on that.

5 So if you think about the speeding analogy that I
6 gave you earlier, a car is going down the road. You know, it
7 may or may not get caught speeding, depending on the number of
8 police officers who are out there. Right?

9 Well, now if you say that the police officers are
10 only allowed to be out there between 9:00 and 11:00 a.m.,
11 they're going to catch a lot less speeders. And they're going
12 to catch a lot less speeders repeating their speeding.

13 So the caps that Cox put in place has a massive
14 impact on this data analysis that they show.

15 As does blacklists, millions of notices. Now, they
16 can say, oh, it was a DOS attack. You heard Dr. McGarty say,
17 you can scale infrastructure, you add servers, it's not
18 difficult. And we all know that's just true.

19 They didn't want the notices. And the reason they
20 didn't want the notices is because they knew what they wanted
21 to happen here.

22 But even under Dr. Weber's numbers, the amount of
23 repeat infringement is totally unacceptable. You can say at 13
24 notices, it was 98 percent, and that's an A+. Why are we
25 looking at 13 notices? Where in the world do you get 13

1 chances to screw up? It's -- so Cox originally had a
2 three-strike policy. Why don't we look at the three number?

3 I want to turn to the DMCA. So Cox talks about a
4 shared responsibility. Well, the way that shared
5 responsibility works is when they get notices, they act on
6 them. That's how shared responsibility works.

7 See, that's why it's not asking Cox to monitor. All
8 they got to do is respond to the notices they get. And that's
9 what the DMCA contemplates, and you can see that in the law
10 that was put before you.

11 And Mr. Elkin says, well, you know, the DMCA, it's
12 just somebody says so. It's not somebody, it's Congress. It's
13 the law of the land.

14 So we're not asking Cox to police their network.
15 We're not asking them to monitor their network. But when they
16 get notices, you don't get to throw them in the trash. And you
17 don't get to say, don't send me notices.

18 Let me turn to the issue of right and ability to
19 control. This one, to me, seems so fundamental. You've got an
20 agreement with every one of your customers that gives you the
21 right to say, you're terminated as soon as you're caught
22 infringing, even once. And all the witnesses agreed to that.
23 And you know that they have the ability to flip the switch and
24 terminate them. Case done on that element, it's easy, we're
25 there.

1 And material contribution, similarly. Without the
2 service that Cox provides, these subscribers would not be
3 infringing on the network.

4 And it's not -- you can't just say, oh, they might
5 infringe elsewhere. That's like saying, well, you know, why
6 arrest them in this county because they could commit the crime
7 in another county? It doesn't make sense. It's not an excuse.
8 It's saying, we shouldn't be held responsible for responding to
9 notices.

10 Cox says that it didn't believe that it was
11 facilitating infringement.

12 Can you pull up PX 242, please.

13 Do you remember this document? After a number of
14 changes that they made in the graduated response policy, Jason
15 Zabek sends this out. And focus on the bottom, the second half
16 of that sentence: I think we didn't help anyone with this
17 action, expect -- he means except -- except the law-breaking
18 customers.

19 They knew exactly what they were doing every time
20 they changed the policy. It was in their culture, it was what
21 was driving them because they wanted customers and revenue.

22 And Cox presented in their closing all this
23 testimony, we really want to do the right thing, it's important
24 to us. And it's easy to say that now after the fact and
25 testimony. The question is, what were they saying at the time

1 when they weren't in front of a judge and a jury?

2 Well, what did they say? Let's look at PX 335.

3 This was their respect for the law. This is what
4 they said: "F" the DMCA.

5 And then when somebody saw that that was in the
6 e-mails, they responded. Let's go to the next one, please.

7 Mr. Carothers said: Please stop sending e-mails out
8 that say "F" the DM -- "F" the law or "F" some company. If we
9 get sued, those e-mails are discoverable and would not look
10 good in court.

11 That's what they were worried about. Not whether or
12 not they had an effective system.

13 I want to respond to the notion that a \$750-a-work
14 statutory damage award would be appropriate and put it in
15 context.

16 Everybody agreed, there's no ability to measure the
17 number of downloads that happened here. We heard it from every
18 witness. Even the experts agreed on that. So we have no idea
19 what the total harm was.

20 But what Cox wants to have to pay, what they want the
21 award to be is the same amount that they're paying one of their
22 experts for one hour. That's for the entire recording as much
23 as it was used, the entire musical composition for as much as
24 it was used for years.

25 So Cox literally puts billions and billions of

1 dollars in its pockets, and it wants to give one hour's worth
2 of their expert's time to an artist for unlimited theft of that
3 recording or composition.

4 Let me close on this. We have seen something
5 important and telling during this trial. To this day, Cox
6 still refuses to accept responsibility. It refuses to
7 acknowledge that what it did was wrong.

8 Think about Cox's opening. Think about the evidence
9 that was presented. Think about the questions that were asked
10 and the testimony of the witnesses on both sides. Has anyone
11 on behalf of Cox said, you know what, we made mistakes? Not
12 one.

13 Cox refuses to recognize that what it did was wrong.
14 They call e-mails goofy. That's what they say, they're goofy.
15 That's not goofy. When you say the things they've said, you're
16 telling the world what you think.

17 Cox refuses to acknowledge the wholesale failure to
18 abide by its own policies. They set their policies, we didn't.
19 They didn't abide by their own policies.

20 Copyright infringement is not a victimless crime, but
21 Cox refuses to acknowledge that its actions harmed copyright
22 owners. It harmed recording artists. It harmed songwriters.
23 It harmed everybody in the ecosystem. It harmed the back-up
24 musicians, the union musicians, the digital engineers. It
25 harmed everybody in that process. And Cox refuses to

1 acknowledge that its focus has been on its bottom line.

2 In Cox's opening slides they had a question: Is it
3 right? And I ask you, is what Cox has done right? From our
4 perspective, the answer is clear. And we ask you to use your
5 common sense and judgment to do justice here.

6 I thank you for your service and your time.

7 THE COURT: All right, thank you.

8 All right. As I've indicated last evening in the
9 instructions that I read, you will have copies of the
10 instructions that will be sent back to you, as well as the
11 exhibits.

12 And as I also said, your first order of business will
13 be to select a foreperson, who will be your represent -- leader
14 here in the -- maybe not in the deliberations. You all have an
15 equal part in the deliberations. But as far as sending any
16 communications to me in writing, your foreperson or other
17 member of the jury can send me a note and say, we would like
18 some information. And I will do what I can to respond.

19 I don't say that that's -- I believe that's, you
20 know, necessary. But if you believe it's necessary, then you
21 certainly have the ability to send me a note, and I will either
22 respond back in writing or I will bring you all out here
23 together in the courtroom and respond in that manner.

24 So if you have questions, we're here to respond to
25 them.

1 Remember that your notebooks are for your own
2 consideration and refreshing your own recollection, but aren't
3 to be shared with other members of the jury.

4 Remember also, of course, that you should decide the
5 case yourselves, but after you listen to the -- your fellow
6 jurors and consider the opinions that they have voiced, and
7 work on being able to come back with a verdict. But, again, it
8 must be based on your own individual decisions.

9 Remember, your verdict must be unanimous. And that
10 when you have reached a verdict, you sign the verdict form, the
11 foreperson will sign it and date it, and then you will bring it
12 back into court.

13 You will get the evidence in a moment as well. And
14 please take the time that you need to carefully deliberate as
15 we've -- as we know that you will. And we will not bother you
16 in the meantime.

17 You may take your lunch whenever you would like to
18 take your lunch. Just let Joe know. And remember, do not
19 deliberate unless all of you are present.

20 You may decide to go home for the evening at
21 5 o'clock or 5:30. What you -- you decide now when you leave
22 or when you come back in the morning. And I'm not saying
23 that -- I'm not trying to tell you how long your deliberations
24 should take. They should take as long as you believe it's
25 necessary for you to reach a verdict. But I just want to keep

1 tabs on you through Mr. Ruelas just to have an idea what you're
2 doing.

3 So when you decide to take breaks, when you -- just
4 let Mr. Ruelas know. He will be on the other side of the door
5 and be happy to accommodate any requests you may have if we can
6 do so.

7 All right, thank you all. You are excused at this
8 time to begin your deliberations.

9 NOTE: At this point, 12:18 p.m., the jury leaves the
10 courtroom to begin their deliberations; whereupon the case
11 continues in the absence of the jury as follows:

12 JURY OUT

13 THE COURT: All right. Just let Joe know where you
14 are and how to get in touch with you in case we have a question
15 so that we can reassemble.

16 I have some hearings. I have one at 1:00 and I have
17 one at 2:00, so we need to clear the front tables.

18 Anything we need to talk about before we recess?
19 Yes, sir.

20 MR. OPPENHEIM: Just a process issue, Your Honor.

21 With respect to the filing on this 7,200 works, is
22 there a need to get that done during the holidays, or can we
23 defer that until after?

24 THE COURT: No, we can defer that.

25 MR. OPPENHEIM: Thank you, Your Honor.

1 THE COURT: Okay. All right, we're in recess.

2 NOTE: At this point, a recess is taken; whereupon at
3 3:36 p.m. the case continues in the absence of the jury as
4 follow:

5 JURY OUT

6 THE COURT: All right. Good afternoon everyone.

7 We have a request from the jury, which reads, for the
8 record: May we have a copy of Black's Law Dictionary, please?

9 And I have given you what I've proposed as a
10 response, but I'm interested in your responses as well.

11 So does anybody have any ideas how to modify or
12 change the response?

13 MR. ELKIN: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 MR. ELKIN: Defendants are fine with your proposed
16 reply.

17 THE COURT: Okay. All right, thank you.

18 Mr. Oppenheim.

19 MR. OPPENHEIM: We agree, Your Honor.

20 THE COURT: Okay. All right. I mean, we could open
21 up the Internet to them if you want and go from there, but I
22 think this is probably a more --

23 MR. OPPENHEIM: Would that include peer-to-peer
24 access, Your Honor, or not?

25 THE COURT: All right. Then I'm going to sign and

1 send this back to them.

2 And hopefully this is just one of these initial
3 gathering-of-information type questions, but we will know that
4 soon enough.

5 All right. Then thank you all for assembling.

6 And we're in recess until we need to get together
7 again. Thank you.

8 NOTE: At this point a recess is taken; whereupon no
9 further matters are heard and the December 18, 2019, portion of
10 the case is concluded.

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12
13 CERTIFICATE OF COURT REPORTERS

14
15
16 We certify that the foregoing is a true and
17 accurate transcription of our stenographic notes.

18
19 /s/ Norman B. Linnell
20 Norman B. Linnell, RPR, CM, VCE, FCRR

21
22 /s/ Anneliese J. Thomson
23 Anneliese J. Thomson, RDR, CRR